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Supreme Court, U.S.
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No. _____
08-293

In The

Supreme Court of the United States

SPLENDID SHIPPING SENDIRIAN BERHARD and M/V HARMONY CONTAINER, *in rem*,

Petitioners,

v.

TRANS-TEC ASIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GERALD L. GORMAN
Counsel of Record
BRADLEY M. ROSE
LISA G. TAYLOR
KAYE, ROSE & PARTNERS, LLP
402 West Broadway, Suite 1300
San Diego, California 92101
Tel.: (619) 232-6555
Fax: (619) 232-6577

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Neither U.S. law nor any relevant foreign law permits the parties to a maritime transaction to create a maritime lien by agreement when the lien would not otherwise arise by operation of law. Moreover, two federal circuits have held that the Federal Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq.*, does not recognize a U.S. maritime lien for goods or services provided by a foreign supplier to a foreign vessel in a foreign port. May a foreign supplier, by use of a U.S. choice-of-law clause in a sales contract with a foreign vessel's foreign charterer, nevertheless extend the application of the FMLA in order to create a U.S. maritime lien for goods that it furnished to the foreign vessel in a foreign port, as held below by the Ninth Circuit (in conflict with the decisions of three other federal circuits)?

PARTIES TO THE PROCEEDING

Petitioner Splendid Shipping Sendirian Berhard (Splendid), a Malaysian company (which is owned by a Malaysian public company and a Singapore corporation domiciled in Malaysia), owns petitioner *M/V HARMONY CONTAINER*. Splendid and the *M/V HARMONY CONTAINER* were defendants-appellees and cross-appellants below.

Respondent Trans-Tec Asia, a Singapore "sole proprietorship" (which is wholly owned by a Singapore private company that is, in turn, wholly owned by another Singapore private company), was the plaintiff-appellant and cross-appellee below.

RULE 29.6 DISCLOSURE

Halim Mazmin Berhad, a Malaysian public company, owns 60% of petitioner Splendid. Powick Marine (Singapore) Pte., Ltd., a Singapore corporation domiciled in Malaysia, owns 40% of petitioner Splendid. Splendid owns petitioner *M/V HARMONY CONTAINER,* a Malaysian flag vessel.

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PETITION FOR A WRIT OF CERTIORARI

Splendid Shipping Sendirian Berhard and the *M/V HARMONY CONTAINER* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

Under certain circumstances, federal maritime law provides a powerful form of security to those who furnish "necessaries" (such as fuel or supplies) to a vessel: a maritime lien binding the vessel receiving the necessaries. The lien, created at the time and place of the necessaries' delivery, follows the vessel wherever it goes and continues even if the vessel is sold to a good faith purchaser. On default, the holder of the lien may "arrest" the vessel and force its sale to recover the debt. The availability of the lien encourages suppliers to extend credit to vessels, thus facilitating commerce. But to facilitate commerce it is equally important that maritime liens not be granted too readily. Enforcing liens can slow commerce, the risk of competing liens can discourage suppliers and lenders from extending credit to vessels, and liens can impose inequitable burdens on third parties. Congress therefore struck a careful balance, making maritime liens available only in limited situations. They are, therefore, strictly construed by the courts.

In this case, the Ninth Circuit (in conflict with three other federal circuits) ignored Congress's careful balance and instead conferred a U.S. maritime lien on a foreign supplier that sold fuel in a foreign port to a foreign ship (owned by one foreign company and chartered to another foreign company). Relying on a contractual choice-of-law clause in the sales contract for the fuel, the court of appeals effectively allowed the contracting parties to create a maritime lien by agreement – a result that U.S. law has consistently rejected. No other country involved in this transaction would have granted a maritime lien on these facts, and those other nations would neither recognize nor enforce the U.S. maritime lien that the Ninth Circuit created.

This case offers the Court an ideal vehicle to resolve an entrenched conflict on a recurring issue of fundamental commercial importance. The Court should grant certiorari and clarify the confusion that has plagued the lower courts.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1) is reported at 518 F.3d 1120. The Ninth Circuit's order denying rehearing (App. 167) is unreported.

The district court's order of December 28, 2004, denying respondent's motion to extend time for discovery (App. 145) is unreported. The district court's order of August 17, 2005, denying summary

judgment to respondent on choice of law (App. 85) is unreported. The district court's order of October 19, 2005, granting partial summary judgment to petitioner on unjust enrichment (App. 64) is unreported. The district court's order of February 2, 2006, granting summary judgment to petitioner (App. 33) is reported at 437 F. Supp. 2d 1124.

JURISDICTION

The court of appeals entered its judgment on March 11, 2008, and denied a timely petition for rehearing on May 5. App. 167. On July 25, Justice Kennedy extended the time to file a petition for certiorari until September 2. No. 08A60. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Three relevant provisions of the Commercial Instruments and Maritime Lien Act, 46 U.S.C §§ 31301(4), 31341, and 31342, are reprinted at App. 168-69.

STATEMENT

This admiralty case arises out of a dispute over unpaid bunker fuel ordered by a foreign charterer from a foreign fuel broker and delivered to a foreign-owned and foreign-flagged vessel in a foreign port.

The Ninth Circuit, reversing the judgment of the district court and rejecting the decisions of three other courts of appeals, nevertheless granted a U.S. maritime lien.

A. Facts

In February 2003, respondent, a Singapore entity, sold 1150 metric tons of bunker fuel on credit to Kien Hung Shipping Co. ("Kien Hung"), the Taiwanese charterer[1] of the Malaysian owned and flagged *M/V HARMONY CONTAINER* (the "Vessel"). Respondent delivered the fuel to the Vessel in Busan, Korea, and that fuel was largely consumed during the following month on a voyage to Mexico, Panama, and South America. The transaction had no connection with the United States. The Vessel had previously called at ports in the United States, but more regularly visited ports in other countries. After the transaction at issue here, the Vessel made no U.S. port call until after Kien Hung's charter had terminated and the Vessel had been chartered to another company.

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[1] Under a charter agreement, known as a "charterparty," the owner of a vessel grants control of the vessel to a "charterer" for a stated term in exchange for a fee. The vessel then loads and discharges cargo and obtains provisions at ports as directed by the charterer, not the owner. The charterparty here, governed by English law, required Kien Hung to purchase bunker fuel, specified that the master was the charterer's (not the owner's) agent, and prohibited the charterer from binding the Vessel with any maritime liens.

The sales contract for the fuel, concluded through a series of faxes and e-mail messages, incorporated by reference respondent's Standard Terms and Conditions (furnished some three years earlier to the charterer), which contained lien and U.S. choice-of-law provisions.[2] Under U.K., Singapore, Malaysian, or Korean law, no lien for necessaries would arise in these circumstances.

Kien Hung failed to pay for the fuel. It declared bankruptcy in May 2003 and the Vessel was subsequently chartered to another company.

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[2] The incorporated terms and conditions provided:

> 8(a). Products supplied in each Transaction are sold and effected on the credit of the receiving vessel, as well as on the promise of the Buyer to pay thereof, and *it is agreed and the Buyer warrants that the Seller will have and may assert a maritime lien against the Receiving Vessel for the amount due for the Products delivered. This maritime lien shall extend to the vessel's freight payments for that particular voyage during which the bunkers were supplied and to freights on all subsequent voyages.* [emphasis added]
>
> 17. Law and Jurisdiction: Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each Transaction shall be governed by the laws of the U.S. and the State of Florida, without reference to any conflict of laws rules. The laws of the U.S. shall apply with respect to the existence of a maritime lien, regardless of the country in which the Seller takes legal action.

B. Statutory Background

The Commercial Instruments and Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq.*, grants a lien to "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31342(a), *reprinted* App. 168. Fuel qualifies as a necessary under the definition of § 31301(4), *reprinted* App. 169. A maritime lien remains with the ship even though the ship is transferred to another party. *E.g., Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 497 (1923) (maritime lien "accompanies the property into the hands of a bona fide purchaser") (quoting *Vanderwater v. Mills*, 60 U.S. (19 How.) 82, 89 (1857)).

No maritime lien can be created by agreement of the parties. *See, e.g., Piedmont & George's Creek Coal Co. v. Seabound Fishing Co.*, 254 U.S. 1, 10 (1920); *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 555 (1867); *Blominflot v. THE M/V HENRICH S,* 465 F.3d 144, 146 (4th Cir. 2006). Maritime liens are *stricti juris* and arise automatically, by operation of law, independently of any contract with the supplier. *See, e.g., Blominflot v. THE M/V HENRICH S,* 465 F.3d 144, 146 (4th Cir. 2006) (citing *Vanderwater v. Mills*, 60 U.S. (19 How.) 82, 89 (1857). They cannot be extended by construction, analogy, or inference. *Vanderwater v. Mills*, 60 U.S. (19 How.) 82, 89 (1857).

Maritime liens arise, if at all, at the time and place necessaries are furnished. *E.g., Riffe Petroleum Co. v. Cibro Sales Corp.*, 601 F.2d 1385, 1389 (10th

Cir. 1979). Thus an *in rem* proceeding to enforce a maritime lien relates back to the time when it attached.

The U.S. approach to securing maritime suppliers of necessaries is unique. Most maritime nations, including those directly implicated in this transaction (U.K., Malaysia, Singapore, and Korea), do not recognize or permit maritime liens against a vessel to secure payment for necessaries. *See, e.g.*, WILLIAM TETLEY, MARITIME LIENS AND CLAIMS 555 (2d ed. 1998) (U.K.); *id.* at 1331 (Malaysia[3]); *id.* at 1365 (Singapore[4]); *id.* at 1329 (Korea).[5] Malaysia, Singapore, and other nations that follow the English House of Lords' decision in *Halcyon Isle Bankers Trust Int'l, Ltd. v. Todd Shipyards Corp.*, [1981] A.C. 221, would not

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[3] *See Ocean Grain Shipping Pte. Ltd. v. THE DONG NAI* (1996) 4 MLJ 454 (Malaysian High Ct. – Johor Bahru) (Malaysia and Singapore share the same English admiralty jurisdiction and maritime law); *The Ocean Jade* (1991) 2 MLJ 386 (Malaysian High Ct.) (categories of maritime liens in Malaysia same as in England).

[4] *The Andres Bonifacio* (1993) 3 S.L.R. 521 (Singapore C.A.). The Singapore High Court, in a non-conflicts case, also cited *The Halcyon Isle* in declaring the categories of maritime liens in that country to be the same as those recognized in England. *See The Ohm Mariana ex Peony* (1992) 2 S.L.R. 623 (Singapore High Ct.).

[5] In the countries touching this transaction, a claim for necessaries gives rise only to a statutory right *in rem*. The statutory right *in rem* is a limited right to attach the charterer's interest in the vessel or property at the time of seizure. That right terminates when the debtor's interest ceases.

even enforce a U.S. lien for necessaries in their courts. Thus, whether respondent can acquire a U.S. maritime lien enforceable in U.S. courts is critical; otherwise it would be entitled only to a statutory right *in rem* (in addition to its *in personam* rights against the party with which it contracted).

C. Procedural History

When the Vessel arrived at a U.S. port in 2004 under the subsequent charterparty, respondent asserted a lien and sued the Vessel *in rem*, along with petitioner Splendid, the Malaysian owner. App. 5. The district court initially determined that Malaysian law governed the dispute, but applied U.S. law to hold that the U.S. choice-of-law clause had *not* been incorporated into the contract. App. 85. On reconsideration, however, it applied Malaysian law to determine whether the U.S. choice-of-law clause had been incorporated into the contract and held, under Malaysian law, that it had been.

After applying U.S. law (based on the choice-of-law clause), the district court nevertheless granted summary judgment for petitioner because it determined that the FMLA did not provide respondent with a U.S. maritime lien. App. 55-62. The court noted that the FMLA "does not specify that any of the parties to the lien must be connected to the United States . . . but statutes are presumed to lack an extraterritorial extension in the absence of explicit language to the contrary." App. 56. Relying on this

Court's decisions in *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004), and *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991), App. 56, the court found no evidence to show any affirmative Congressional intent to extend the U.S. lien statute to a wholly foreign transaction in order to rebut the presumption. App. 56-57, 61.

Considering the powerful potential for prejudice of a U.S. lien, its impact upon maritime commerce, App. 59, and harmony with the international maritime system, App. 57, the district court relied upon a number of cases holding the U.S. statute did not extend to the foreign transaction. App. 57-62. In a footnote, the court observed the inclusion in the bunker contract of a maritime lien under U.S. law was irrelevant because maritime liens may not arise by contract, only by operation of law. App. 61 n.10.

On appeal, the Ninth Circuit parried the lack of any U.S. connection to the transaction and framed the issue as "whether a foreign supplier, by supplying fuel to a foreign-flagged vessel in a foreign port under an agreement that United States law applied to the transaction, may obtain a maritime lien under the [FMLA] on the vessel docked in an American port." App. 2. The court answered the question affirmatively "[b]ased on the plain language of the statute, coupled with an enforceable choice of law clause." App. 2-3.

The court of appeals explicitly declined to follow contrary decisions of the First and Eleventh Circuits. App. 29-31. In the process, it acknowledged the state

of confusion and uncertainty in prior courts' treatment of this issue, App. 28-31, describing the current caselaw as a "tangled web." App. 28.

In rejecting the district court's conclusion that extending the FMLA to govern this case would result in an extraterritorial application of U.S. law to a wholly foreign transaction, App. 25, the Ninth Circuit simply declared: "Hardly any area of law could be viewed as more extraterritorial than admiralty law." App. 26. The court asserted without discussion, analysis, or explanation that the U.S. lien extension here "does not interfere with Malaysian law . . . or the law of any other nation implicated in this transaction." App. 26.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Deepens an Entrenched Conflict on a Recurring Issue of Fundamental Commercial Importance That This Court Should Resolve.

The circuit courts are deeply split over how broadly 46 U.S.C. § 31342 (App. 168) extends. The Ninth Circuit's decision below extends the statute to a wholly foreign transaction, finding no Congressional intent to prohibit the FMLA's extraterritorial extension. The Fifth Circuit has also permitted the parties to a transaction to extend the reach of the FMLA with a choice-of-law clause. This expansive application of the FMLA conflicts with decisions of

the First and Eleventh Circuits, which follow Congress's intent to limit the FMLA to U.S. suppliers, and of the Second Circuit, which limits the FMLA's reach to cases in which U.S. law applies by its own force (thus precluding the creation of a maritime lien by agreement of the parties).

A. The First and Eleventh Circuits, Following Congress's Intent and the Principle of Strict Construction, Limit the FMLA to Protect Only U.S. Suppliers.

The First Circuit applies the FMLA based on its analysis of Congressional intent and the application of the principle of strict construction. The leading case is *Tramp Oil & Marine, Ltd. v. M/V MERMAID I*, 805 F.2d 42 (1st Cir. 1986), in which a Danish charterer ordered bunker fuel from an English fuel broker, which, in turn, arranged with a U.S. company to supply the fuel in the port of Savannah, Georgia. When the English broker asserted a lien against the vessel, the First Circuit denied the lien on the ground that Congress had not intended the FMLA to protect foreign suppliers. The court explained:

> The primary concern of the Federal Maritime Lien Act is the protection of American suppliers of goods and services. See H. Rep. No. 92-340, 92nd Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Ad. News 1363-65; . . . [additional citation omitted]. With this purpose in mind, and in light of the principle that maritime liens are to be

> strictly construed, [citation omitted] we decline to extend the law for [the English fuel broker's] benefit in the circumstances of this case. [The English fuel broker] is a foreign broker, not an American supplier, and thus not the intended beneficiary of the Maritime Lien Act."

805 F.2d at 46.

The Eleventh Circuit similarly follows Congress's intent, relying on cases holding that the predecessor to § 31342 (46 U.S.C. § 971) was intended to benefit U.S. suppliers. In *Trinidad Foundry and Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992), the parties to a repair contract chose English law. A foreign repairman, which had furnished necessaries to a foreign vessel in Trinidad, arrested the vessel in Florida and asserted two independent claims: (1) an *in rem* claim under English law and (2) a maritime lien under the FMLA. The Eleventh Circuit analyzed each ground separately. The first claim failed because English law does not recognize a maritime lien for necessaries. 966 F.2d at 616-17. The court held that the second claim failed because the FMLA does not recognize a U.S. maritime lien for goods and services supplied by a foreign plaintiff to a foreign vessel in a foreign port. Despite the U.S. lien statute's broad language, its purpose, as revealed by

Congress, was the protection of American, not foreign suppliers. 966 F.2d at 617 (following *Tramp Oil*).[6]

Under the First and Eleventh Circuit interpretation of the FMLA, respondent would have no lien in the circumstances of this case because Congress intended to benefit only U.S. suppliers. It never intended the FMLA to extend to wholly foreign transactions.

B. The Second Circuit Confers a U.S. Maritime Lien Only When the FMLA Is Applicable Under a Proper Choice-of-Law Analysis.

In *Rainbow Line v. M/V TEQUILA*, 480 F.2d 1024 (2d Cir. 1973), a charterer asserted a maritime lien in an effort to obtain priority for its claim over that of a mortgagee. The charterer argued that it was entitled to the benefit of the FMLA, which recognizes

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[6] *Dresdner Bank AG v. M/V OLYMPIA VOYAGER*, 465 F.3d 1267 (11th Cir. 2006), never addressed the issue here. A foreign P & I club insured a Greek cruise ship operating in the Mediterranean and Caribbean. The district court initially determined that the insurer had a maritime lien senior to the banks' mortgage. Because the banks had not appealed the finding of a maritime lien, the sole issue in the court of appeals was the computation of the amount of the lien. Only on remand did they challenge the lien itself. At that point, the district court declined to rule on the issue from which no appeal had been taken. 2007 U.S. Dist. LEXIS 2839 (S.D. Fla. 2007). *OLYMPIA VOYAGER* does not undermine *Trinidad Foundry*, which remains the law of the Eleventh Circuit.

a maritime lien for the breach of a charterparty, because the charterparty had included a U.S. choice-of-law clause. The Second Circuit quickly dismissed the choice-of-law clause, explaining that "maritime liens arise separately and independently from the agreement of the parties." 480 F.2d at 1026. Moreover, the "rights of third persons cannot be affected by the intent of the parties to the contract." *Id.* In other words, the court recognized that the parties to a transaction cannot create a maritime lien by agreement, for maritime liens arise only by operation of law. A clause specifying a nation's law that would recognize a maritime lien (if that law would not otherwise apply) is no more valid than a clause purporting to create the lien itself by agreement.

Having determined the choice-of-law clause was irrelevant to the existence of a maritime lien, the *Rainbow Line* court had to decide which law did apply. The mortgagee, which was seeking to avoid a maritime lien that would have priority over its mortgage, argued that the issue should be determined under English law (which does not recognize a maritime lien for a breach of charter) because the vessel was English. The Second Circuit also rejected this approach, concluding that the correct solution was a choice-of-law analysis under *Lauritzen v. Larsen*, 345 U.S. 571 (1953). *See* 480 F.2d at 1026.

By coincidence, the *Lauritzen* analysis in *Rainbow Line* pointed to U.S. law, and thus the charterer obtained its lien under the FMLA. *See* 480 F.2d at 1026-27. But that holding was based on the proper

law applicable to the transaction in view of its connections with various jurisdictions. The choice-of-law clause was irrelevant to the decision.

Applying the Second Circuit's analysis to the facts of this case, the Ninth Circuit plainly erred in granting a lien to respondent. Once the irrelevant U.S. choice-of-law clause is ignored, the most significant contacts are with Malaysia – as each court below held in doing its *Lauritzen* analysis. *See* App. 8-11 (Ninth Circuit's *Lauritzen* analysis); App. 42; 132-43 (district court's *Lauritzen* analysis). Thus the Second Circuit's rule would require respondent's claim to a maritime lien to be evaluated under Malaysian law (which plainly does not recognize such a lien).

C. The Fifth Circuit, Now Joined by the Ninth Circuit, Permits the Parties to a Commercial Transaction To Create a Maritime Lien by Contract, Simply by Including a Choice-of-Law Clause Conferring a Lien that Would Not Otherwise Arise.

In *Liverpool & London S.S. Protection & Indemnity Association v. QUEEN OF LEMAN M/V*, 296 F.3d 350, 353 (5th Cir. 2002), which the Ninth Circuit followed below, App. 15, an English marine insurer arrested two vessels and asserted a U.S. maritime lien to recover unpaid insurance premiums. Although English law generally governed the insurance contract, the insurer relied on a contract provision giving it the right to enforce a lien on an insured ship in

"any jurisdiction" "in accordance with local law." Competing creditors disputed their respective priorities to the proceeds of the sale, and two creditors challenged the English insurer's right to assert a lien.

The Fifth Circuit applied U.S. law as the "local law" of the place into which the vessel had sailed, concluding that this result was the intent of the parties as reflected in their insurance contract. 296 F.3d at 353-54. Although the court did not explicitly address whether Congress had intended the FMLA to protect foreign suppliers, it carefully dismissed any concerns about the need for uniformity with this statement:

> "We also reject . . . [the competing creditors'] suggestion that the application of United States substantive law would lead to uncertainty and undermine the goal of uniformity in maritime law. They argue that by resorting to the substantive law of foreign jurisdictions, a maritime lien would appear and disappear as the ship sailed to different jurisdictions that might or might not recognize such a lien. We do not share their concern. We note that the existence of a maritime lien would only change as the ship entered a jurisdiction that granted more expansive rights than English law. Moreover, there is nothing absurd about applying the law of the jurisdiction into which the ship sails, as the ship's presence in the jurisdiction represents a substantial contact. Therefore, having determined that local law controls the existence of the maritime lien, we disagree that

> this interpretation would lead to nonsensical results."

296 F.3d at p. 354.

Now that the Ninth Circuit has adopted the approach taken by the Fifth Circuit in *QUEEN OF LEMAN*, two of the largest maritime circuits (covering the entire West Coast and half of the Gulf Coast) stand in sharp conflict with three other maritime circuits (which cover the most important commercial centers on the East Coast and the other half of the Gulf Coast). While the eastern circuits carefully follow Congress's intent to limit the benefit of the FMLA to domestic suppliers, the Fifth and Ninth Circuit freely extend it to foreign suppliers in wholly foreign transactions. While the most important commercial circuit carefully limits the parties' ability indirectly to obtain a maritime lien by contract (through a choice-of-law clause), the Fifth and Ninth Circuit freely enforce choice-of-law clauses to create maritime liens for transactions having no connection with this country (relying on the vessels' subsequent call at a U.S. port).

D. District Court Decisions in Other Circuits Provide Further Evidence of the Confusion in the Lower Courts.

In addition to the decisions in the five circuits discussed above, district courts in other circuits have also had to grapple with the question presented here. One recent example is *Triton Marine Fuels, Ltd., S.A.*

v. M/V Pacific Chukotka, 504 F. Supp. 2d 68 (D. Md. 2007), *appeal pending* (07-1908). In *Pacific Chukotka*, a sub-charterer's Seattle business office used its Seattle agent to order fuel through a Canadian agent from a non-U.S. supplier for delivery to a foreign vessel in Odessa, Ukraine. The order confirmation included a U.S. choice-of-law clause.

The district court assumed for purposes of its decision that the choice-of-law provision was enforceable, but nonetheless concluded that no maritime lien was created in favor of the foreign supplier because (1) U.S. maritime lien law does not apply extraterritorially; (2) § 31342 does not confer a maritime lien for foreign suppliers to foreign vessels in foreign ports; and (3) Congress's primary concern when it enacted the U.S. maritime lien law was the protection of American suppliers. In other words, the *Pacific Chukotka* court aligned itself with the First and Eleventh Circuits.

In *Loginter SA v. M/V NOBILITY*, 177 F. Supp. 2d 411 (D. Md. 2001), on the other hand, the district court essentially followed the Second Circuit's approach, conducting a *Lauritzen* analysis to determine that Polish law should determine whether a maritime lien existed. Although these district court cases are obviously not part of the inter-circuit conflict, they still help to demonstrate the confusion that exists in the lower courts.

E. Foreign Decisions Attempting to Apply U.S. Law Provide Further Evidence of the Existing Confusion and the Need for Clarification by This Court.

The lower courts in this country are not the only ones in need of this Court's clarification of the proper scope of the FMLA. When foreign courts, under their own choice-of-law rules, are required to apply U.S. law, they are equally at a loss to determine the content of the law they are required to apply. This difficulty is well-illustrated by two recent Canadian cases reaching opposite results acknowledged even by the Ninth Circuit to be well neigh irreconcilable. *See* App. 28 n.11.

In *Kirgan Holding, S.A. v. Ship Panamax Leader*, 2002 F.T.C. 1235, 2002 AMC 2917 (Can. Fed. Ct. Trial Div. 2002), which was cited by the court below (at App. 16), a Panamanian seller contracted with a U.S. corporation that subcontracted with a German company to deliver the fuel in Valetta, Malta, to a vessel registered in Malta and Cyprus on the orders of a charterer from St. Vincent and Grenadines. Although English law governed the charter, the supply contract with the Ukrainian agent contained a U.S. choice-of-law provision. When the vessel was arrested in Canada (which does not recognize maritime liens for necessaries), the court gave effect to the choice-of-law clause and, following the example of the Fifth Circuit, enforced a maritime lien.

By contrast, in *JP Morgan Chase Bank v. Mystras Maritime Corp.*, [2006] F.C. 409, 2006 Fed. C.C. LEXIS 412, 2006 AMC 812, a mortgagee arrested a Liberian vessel in Canada and competing claims were adjudicated. Three of the competing creditors had furnished fuel or supplies in foreign ports under contracts containing U.S. choice-of-law provisions. This time, the Canadian court cited and followed the decisions of the Second and Eleventh Circuits and explicitly rejected the Fifth Circuit's conflicting decision. It ruled the U.S. lien did not extend to the wholly foreign transaction because applying the U.S. choice-of-law clause would permit two parties to accomplish indirectly what they could not do directly; *i.e.*, create a maritime lien binding third parties.

F. The Conflict Is Irreconcilable, Deeply Entrenched, and Acknowledged by the Court Below.

The conflict among the circuits is clear and irreconcilable. If the *M/V HARMONY CONTAINER* had been arrested in Boston, New York, or Jacksonville, respondent would have had no lien. Similarly, if the ship in *Rainbow Line* had been arrested in Houston or Los Angeles, a lien would have arisen.

The conflict is so entrenched that nothing would be gained by further percolation. Indeed, the circuits are not resolving their differences but moving into deeper conflict. The First, Second, and Eleventh

Circuits have held their current views for 22, 35, and 16 years, respectively. But during the current decade, the Fifth and Ninth Circuits have both rejected the majority views, first creating and then widening the conflict.

The Ninth Circuit itself acknowledged the "tangled web" of U.S. case law and the state of confusion and uncertainty on this issue. *See* App. 28. Although the court below went to heroic lengths to distinguish *Trinidad Foundry*, the simple fact remains that it explicitly rejected one of the stated rules of the case – an alternate holding on one of the independent issues before that court – because it disagreed with the Eleventh Circuit and wished to reach a different result than the Eleventh Circuit rule would have compelled. *See* App. 29-31.

II. The Ninth Circuit Erred in Extending the FMLA To Confer a Lien in a Wholly Foreign Transaction on the Basis of a Choice-of-Law Clause.

A. The Ninth Circuit Erred in Applying the FMLA to a Wholly Foreign Transaction.

The Ninth Circuit correctly recognized that *Lauritzen v. Larsen*, 345 U.S. 571 (1953), established the governing choice-of-law principles for maritime cases. App. 8-9 & n.6. Applying *Lauritzen*, it correctly determined that this case would be governed by Malaysian law but for the choice-of-law clause. App.

10. Unfortunately, the Ninth Circuit failed to appreciate that *Lauritzen* also guides the proper interpretation of a maritime statute to avoid extraterritorial applications that Congress did not intend. If the court of appeals had fully followed *Lauritzen*, it would have recognized that the existence of a maritime lien in this case should have been determined under Malaysian law.

In *Lauritzen*, this Court considered the application of a different U.S. shipping law, the Jones Act, which then provided (in language even more expansive than 46 U.S.C. § 31342) a negligence remedy under U.S. law to "[a]ny seaman who shall suffer personal injury in the course of his employment." 46 U.S.C. § 688 (1952) (recodified in 2006 as 46 U.S.C. § 30104). A Danish seaman employed in New York aboard a Danish-owned vessel who had been injured in Havana brought suit under the Jones Act in New York. This Court noted the breadth of the "literal language" of the Jones Act:

> If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be "any seaman who shall suffer personal injury in the course of his employment." It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured

> anywhere in the world in service of watercraft of every foreign nation – a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

345 U.S. at 576-77.

This Court rejected such a broad "plain language" interpretation, holding that "such statutes [are] construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." 345 U.S. at 577. The *Lauritzen* Court explained this result as a matter of international comity:

> [I]t has long been accepted in maritime jurisprudence that " * * * if any construction otherwise be possible, an Act [of Congress] will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."

345 U.S. at 578 (quoting *The Queen v. Jameson* [1896] 2 Q.B. 425, 430).

The *Lauritzen* vessel's "frequent and regular" contacts with U.S. ports did not change this analysis:

> [The Danish seaman] places great stress upon the assertion that petitioner's commerce and contacts with the ports of the

> United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

345 U.S. at 581. The Ninth Circuit, however, applied the FMLA (with its less expansive language) to a transaction having even fewer ties to the United States on the basis of the Vessel's less significant contact with a U.S. port.

Although the *Lauritzen* Court specifically ruled that the Jones Act's "[a]ny seaman" did not mean "all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation," 345 U.S. at 577, the Ninth Circuit reasoned that when Congress used the words "a person" in § 31342, it in fact meant "any person, not only an 'American person.'" App. 23.

B. The Ninth Circuit Erred in Failing to Require an Affirmative Statement of Congressional Intent Before Extending § 31342 Extraterritorially.

Lauritzen's approach to construing maritime statutes is consistent with the broader rule employed

by this Court when considering the extraterritorial reach of any act of Congress. An affirmative statement of Congress's intent is required before a federal statute will be construed to apply outside of the United States. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) ("To apply domestic law to foreign vessels entering U.S. waters, there must be present the affirmative intention of the Congress clearly expressed."); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952) ("This Court has often stated that the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears."). Here the Ninth Circuit reversed this long-standing presumption and held that the FMLA should be construed to apply to any transaction anywhere in the world in the absence of evidence that Congress had intended to restrict the statute to cases affecting U.S. interests. App. 23.

C. The Ninth Circuit Erred in Permitting the Parties to a Commercial Transaction To Create a Maritime Lien by Contract.

It is well recognized that no maritime lien can be created by agreement of the parties. *See supra* at 6

(citing cases). As a general matter, therefore, it is beyond dispute that a supplier could not obtain a U.S. maritime lien with a boilerplate clause – no matter how clearly drafted – asserting a lien under circumstances in which a lien would not otherwise have arisen. Thus clause 8(a) of the Standard Terms and Conditions, *supra* note 2, which purported not only to create a maritime lien but also to extend it to freights on subsequent voyages, is plainly invalid (and the Ninth Circuit did not rely on it).

The Ninth Circuit's reliance on clause 17 (the choice-of-law clause), however, was functionally equivalent to enforcing clause 8(a). In the absence of clause 17, no arguable basis exists for imposing a maritime lien. Malaysian law, which indisputably applies but for the choice-of-law clause, does not recognize even the possibility of a maritime lien in this context. The existence of the lien, therefore, depends entirely on clause 17. Although that clause does not provide explicitly for a lien, the effect is exactly the same: the Ninth Circuit conferred a lien that would not otherwise exist because respondent included a provision in its contract to achieve that result. Respondent should not be allowed to accomplish indirectly what it is prohibited from doing directly.

III. Whether the FMLA Applies To Confer Maritime Liens in Wholly Foreign Transactions Is an Issue of Exceptional Commercial Importance.

It is no exaggeration to say that the U.S. and world economies largely depend on the ocean shipping industry. The overwhelming majority of imports and exports – both for this country and for the world at large – are carried by sea, and thus the nation and the world depend heavily on the shipping industry. That industry, in turn, depends on ships operating on time and in sufficient numbers. For the industry to operate at all, ships must be built, which means that they must be financed, and once they are built they must be supplied, insured, fueled, and repaired. For these transactions to work efficiently, the legal system must provide clear and predictable rules so that parties will understand the risks that they take and can make their commercial decisions accordingly.

The global maritime lien system is a central part of the equation. No financial institution will loan money for shipbuilding, for example, unless it has sufficient confidence in the security interest that it will receive in the finished vessel. Suppliers, insurers, repairers, and everyone else who operates in the industry will base their prices, in part, on whether they can obtain a maritime lien to secure payment, and what they must do to enforce it.

Unlike liens on land, which generally follow a first-in-time, first-in-right rule, maritime liens are

generally subject to an inverse-order-of-priority rule. *See generally, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 9-2, at 588 (2d ed. 1975). Even a preferred ship mortgage will lose priority to a subsequent preferred maritime lien. 46 U.S.C. § 31326(b)(1). Because most ships do not qualify for a preferred ship mortgage (which is available only for U.S. ships), the risks are generally even greater. Having clear rules for the creation of maritime liens is therefore essential for every player in the industry as anyone can be adversely affected by a maritime lien.

Having clear rules to govern commercial transactions is always important so that those who enter into transactions will be able to understand the terms on which they participate. Having clear rules to govern maritime liens is even more important than in other commercial fields because they affect not only the parties that enter into the particular transaction by which they are created but also every other person that deals with the vessel and may therefore have a claim against it. In this case, for example, the impact of the maritime lien would not be limited to respondent and Kien Hung (the two parties to the sales contract). Most obviously, a maritime lien would affect petitioner, who played no part in the underlying sales transaction (and did everything possible in its agreement with Kien Hung to ensure that Kien Hung did *not* create any liens on the Vessel). It would also affect mortgagees, anyone with a foreign *in rem* claim and any other person who might have a claim

secured by a maritime lien with a lower priority than respondent's.

It is particularly important for this Court to resolve the precise question presented by this case because the United States stands among very few countries recognizing maritime liens for necessaries. The Fifth and Ninth Circuits' expansive rule, applying the FMLA to transactions having no connection to the United States, is an open invitation to forum shopping – encouraging suppliers throughout the world to bring claims to this country to be resolved in our federal courts because they cannot succeed in any other forum. Indeed, this case is a perfect illustration of the problem. Respondent apparently took no action to recover the money that Kien Hung owed to it until the next time the Vessel called at a U.S. port, when it promptly filed the present action.

IV. The Present Case Provides an Ideal Vehicle for Resolving the Entrenched Conflict Among the Lower Courts.

This case offers the Court an ideal vehicle to resolve an entrenched conflict on an important issue. The undisputed facts are simple and straightforward. The case presents the legal issue in its cleanest form because all of the parties in the underlying transaction are foreign.[7] Every *Lauritzen* factor

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[7] Most cases do not present the issue so cleanly. In *Triton Marine Fuels, Ltd. v. M/V PACIFIC CHUKOTAKA*, 504 F. Supp. 2d 68 (D. Md. 2007), *appeal pending* (4th Cir. docket no. 07-1908)

(Continued on following page)

points to the application of foreign law, and both lower courts have already agreed on the foreign law that should apply under *Lauritzen*. Thus the Court is offered a stark choice between construing the FMLA as the Ninth Circuit did, to apply whenever a supplier includes a U.S. choice-of-law clause in its standard terms and conditions, or allowing *Lauritzen*'s choice-of-law principles to govern, thus leaving the case to be resolved under Malaysian law.

It is also clear that the entire case turns solely on the one legal issue presented here. If petitioner prevails on this issue, respondent will have no claim; no other forum available to respondent would recognize a maritime lien in these circumstances. If respondent prevails on this issue, the Ninth Circuit has already decided § 31342 extends extraterritorially. There are no other issues in the case and no potential alternative grounds for decision.

(oral argument scheduled October, 2008), for example, the transaction was largely foreign but several significant U.S. contacts might cloud the analysis.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GERALD L. GORMAN
Counsel of Record
BRADLEY M. ROSE
LISA G. TAYLOR
KAYE, ROSE & PARTNERS, LLP
402 W. Broadway, Suite 1300
San Diego, CA 92101
Telephone: (619) 232-6555
Facsimile: (619) 232-6577
Attorneys for Petitioners

September 2, 2008

TRANS-TEC ASIA, Plaintiff-Appellant,

v.

M/V HARMONY CONTAINER, its freights engines apparel and tackle; Splendid Shipping Sendirian Berhad; Master of the M/V HARMONY CONTAINER, Defendants-Appellees.

Trans-Tec Asia, Plaintiff-Appellee,

v.

M/V HARMONY CONTAINER, its freights engines apparel and tackle; Splendid Shipping Sendirian Berhad, Defendants-Appellants,

and

Master of the M/V HARMONY CONTAINER, Defendant.

Nos. 06-55355, 06-55397.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 16, 2007.

Filed March 11, 2008.

J. Stephen Simms, Simms Showers LLP, Baltimore, MD, Gary R. Clouse, Isaacs Clouse Crose & Oxford LLP, Santa Monica, CA, for the appellant.

Gerald L. Gorman, Bradley M. Rose, Kaye Rose & Partners, LLP, San Diego, CA, for the appellee.

Appeals from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CV-04-01160-SVW.

Before: ALEX KOZINSKI, Chief Judge, A. WALLACE TASHIMA and M. MARGARET McKEOWN, Circuit Judges.

McKEOWN, Circuit Judge:

Like many maritime cases, this case involves a foreign-flagged vessel that sailed in and out of United States ports. And, like many maritime cases, because of the geographic scope of the high seas,[1] United States law may, in some cases, be applicable to transactions beyond our country's territorial waters and borders. And, like many maritime cases, the suit here arose against the vessel while it was docked in a United States port. The question we consider is whether a foreign supplier, by supplying fuel to a foreign-flagged vessel in a foreign port under an agreement that United States law applied to the transaction, may obtain a maritime lien under the Federal Maritime Lien Act, 46 U.S.C. § 31301 *et seq.* ("FMLA"), on the vessel docked in an American port. The district court granted summary judgment in favor of the vessel and its owner and against the fuel provider, holding that the FMLA did not permit a foreign necessaries provider to obtain a maritime lien under the circumstances. Based on the plain language of the statute, coupled with an enforceable

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[1] The "high seas" is generally defined as "the seas or oceans beyond the jurisdiction of any country." *Black's Law Dictionary* 1376 (8th ed. 2004).

choice of law clause, we conclude that a maritime lien arose under the FMLA, and we reverse.

BACKGROUND

Splendid Shipping Sendirian Berhad ("Splendid")[2] is a Malaysian corporation that owns the M/V *Harmony Container* ("*Harmony*"), a Malaysian-flagged vessel. In June 2000, Splendid entered into a charter-party with Kien Hung Shipping Company ("Kien Hung") for a ten-year charter of the *Harmony*. Kien Hung, a Taiwanese corporation, operated the *Harmony* in a loop from ports in North and South America to ports in Japan, China, and Korea. In particular, the *Harmony* made regular stops at Long Beach, California, and Manzanillo, Mexico.

In early February 2003, one of Kien Hung's managers sought a price quote for fuel bunkers. The manager contacted an agent at Yee Foo Marine Industrial Co. Ltd. ("Yee Foo"), who requested a price quote from Trans-Tec Asia ("Trans-Tec"), a Singaporean entity. An employee for Trans-Tec faxed a quote to the Yee Foo agent, who forwarded the quote to Kien Hung. The Kien Hung manager then faxed back an order to the Yee Foo agent, who forwarded the order to Trans-Tec. In response, Trans-Tec sent a one-page email confirmation ("Bunker Confirmation") to Yee

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[2] In the parties' briefs, Splendid's name is listed as "Splendid Shipping Sendirian Berhad," though other documents, such as the district court's orders, used "Berhard."

Foo for the sale of 1150 metric tons of fuel bunkers to be supplied to the *Harmony* at a cost of U.S. $251,850. The Yee Foo agent then forwarded the Bunker Confirmation to Kien Hung, which did not respond.

The Bunker Confirmation named "Kien Hung Shipping Co. Ltd." and "The Vsl, Her Master and Owners" as "Buyer," and Trans-Tec as "Seller." It provided that "[t]his confirmation incorporates Seller's standard terms and conditions dated 3 January 2000. Pls inform us if you require a copy." Kien Hung did not request a copy.

Trans-Tec's standard terms and conditions are included in a document entitled "The Trans-Tec Services Group of Companies General Terms and Conditions" ("Terms and Conditions"). The Terms and Conditions state that "the General Terms shall apply to every sale of marine petroleum products ('Products') entered into between a particular Trans-Tec Group company as seller ('Seller') and any buyer of such Products ('Buyer')."

The Terms and Conditions also contained an incorporation and merger clause ("The Confirmation and the General Terms . . . taken together, shall constitute the full agreement. . . ."), and, particularly pertinent here, a choice of law clause, which stated:

> Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each Transaction shall be governed by the laws of the United States and the

> State of Florida, without reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which Seller takes legal action.

Trans-Tec delivered the bunkers to the *Harmony* in Busan, South Korea, in late February 2003. In May 2003, Kien Hung went bankrupt, and Trans-Tec was left unpaid for the bunkers. Hamburg Sud, a German company, bought Kien Hung's operations, took over the *Harmony*'s charter, and continued sailing the vessel to Long Beach, California. Trans-Tec threatened to arrest the *Harmony* once it arrived at Long Beach, but the vessel's insurers posted security to avoid taking the ship out of operation.

Trans-Tec filed suit in federal court in Los Angeles, asserting a maritime claim in contract and in tort against the *Harmony,* a maritime claim in contract against Splendid, a claim for unjust enrichment against Splendid, and maritime attachment and garnishment of the *Harmony* and its bunkers.[3] The district court chose to resolve the dispute in stages. Realizing that the choice of law issue was the foundational building block, the court first invited the

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[3] Trans-Tec ultimately dropped its tort claim for conversion against the *Harmony*. It also made a *quasi in rem* claim against Splendid for maritime attachment and garnishment of the *Harmony* under Supplemental Rule B for Certain Admiralty and Maritime Claims. That claim was among those dismissed and is not part of the appeal.

parties to brief only this issue with respect to Trans-Tec's claims regarding a maritime lien and unjust enrichment. The court then decided that, under United States law, the choice of law provision was not incorporated as a term of the contract, Splendid was not bound as a party to the contract, and Malaysian law governed the contract.

In a later order granting partial summary judgment to Splendid on its unjust enrichment claim, the district court informed the parties that it would reconsider its prior decision that United States law determined incorporation of the choice of law clause. The court ultimately granted summary judgment against Trans-Tec on the grounds that: (1) Malaysian law, not United States law, governed contract formation; (2) under Malaysian law, the United States choice of law clause was incorporated as a term of the contract; and (3) Trans-Tec could not obtain a maritime lien on the *Harmony* because United States law denied maritime liens to foreign necessaries providers servicing foreign-flagged ships in foreign ports. Trans-Tec now appeals this decision, and Splendid cross-appeals on the basis that the district court should not have applied the United States choice of law provision to the transaction in any respect.

During the back-and-forth flurry of summary judgment motions, Trans-Tec filed an affidavit in which it expressed a need to conduct discovery to establish that Splendid was a party to the contract and that Splendid had participated in the bunker contract. The district court construed Trans-Tec's

affidavit as a motion for additional time to conduct discovery under Federal Rule of Civil Procedure 56(f), denied the motion, and later denied Trans-Tec's motion to reconsider its ruling.

ANALYSIS

Trans-Tec's Terms and Conditions included a choice of law provision that designated United States law as governing the existence of a maritime lien. That designation is particularly significant because the United States is one of a handful of countries that recognizes a maritime lien for the provision of necessaries.[4] 46 U.S.C. § 31342; WILLIAM TETLEY, MARITIME LIENS AND CLAIMS 551 (2d ed. 1998) ("TETLEY"). Splendid's first line of defense is that the choice of law clause was not a part of the contract between Trans-Tec and Kien Hung. Alternatively, Splendid urges that the maritime lien does not apply to the provision of necessaries by a foreign provider. Our resolution of this appeal proceeds in three steps:[5] (1) we determine the governing law with respect to

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[4] Fewer than thirty countries, among them the United States and France, recognize such a lien. *See* TETLEY at 551 (stating that maritime liens arise only in the United States, France, and those nations that signed on to the 1926 Brussels Convention, which provides a maritime lien for necessaries under limited circumstances).

[5] We review de novo both the district court's grant of summary judgment and the legal question whether Trans-Tec's claims give rise to a maritime lien. *Myers v. Am. Triumph F/V*, 260 F.3d 1067, 1069 (9th Cir. 2001).

contract formation; (2) applying the controlling law, we next determine whether the contract incorporates the choice of law provision; and (3) finally, if the choice of law provision is incorporated as a term of the contract, we evaluate whether Trans-Tec acquired a maritime lien for supplying fuel bunkers to the *Harmony*.

I. Determining the Law Governing Contract Formation

Before we can determine the validity of the United States choice of law provision in the contract between Trans-Tec and Kien Hung, we need to figure out which country's law controls the issue of contract formation. Because the availability of a maritime lien under United States law is the ultimate question, the temptation is to skip directly to United States law, as urged by Trans-Tec. That approach, however, "put[s] the barge before the tug." *See DeNicola v. Cunard Line, Ltd.*, 642 F.2d 5, 7 n. 2 (1st Cir. 1981). Instead, we consider which country's law governs the incorporation issue as if there were no choice of law clause. In other words, we cannot rely on the choice of law provision until we have decided, as a matter of law, that such a provision was a valid contractual term and was legitimately incorporated into the parties' contract.

Both Supreme Court and Ninth Circuit law direct our analysis. We are guided by the principle that "[i]n the absence of a contractual choice-of-law

clause, federal courts sitting in admiralty apply federal maritime choice-of-law principles derived from the Supreme Court's decision in *Lauritzen v. Larsen,* 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and its progeny." *Chan v. Soc'y Expeditions, Inc.,* 123 F.3d 1287, 1296 (9th Cir. 1997) (citations omitted).

In *Lauritzen,* the Supreme Court identified seven factors "which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim":[6] (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. 345 U.S. at 583-92, 73 S.Ct. 921. We have added that courts should weigh and evaluate all relevant points of contact between the transaction and the sovereign legal systems that are affected by it, and not simply run through a mechanical analysis of the *Lauritzen* factors. *Tento,* 694 F.2d at 1194-95. Accordingly, we also consider factors that § 188 of the Restatement identifies as relevant where a contract lacks a choice of law provision, such as the place of negotiation of the contract, the place of

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[6] Although *Lauritzen* dealt with tort claims under the Jones Act, the "Supreme Court has extended the *Lauritzen* approach to 'guide courts in the application of maritime law generally.' " *Gulf Trading & Transp. Co. v. M/V Tento,* 694 F.2d 1191, 1193 (9th Cir. 1982) (quoting *Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 382, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959) (citations omitted)).

performance and the place of business of the parties. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971); *Gulf Trading & Transp. Co. v. The Vessel Hoegh Shield,* 658 F.2d 363, 366-67 (5th Cir. 1981) (discussing § 188 factors where there was no choice of law clause).

In weighing all the points of contact implicated by the transaction, including the factors set out in *Lauritzen* and the Restatement, we agree with the district court's conclusion that under maritime conflicts of law principles, Malaysian law governed the contract formation. Splendid's nationality and the *Harmony*'s flag are "substantial contacts" with Malaysia that point towards Malaysian law "as the most appropriate for resolving this litigation." *Tento,* 694 F.2d at 1196. No sovereign other than Malaysia boasts such substantial contacts. That the bunkers were supplied in Busan, South Korea, "was dictated in large part by the fortuity of the ship's location and intended route." *Id.* at 1195. Deciding which country constituted the "place of contract" or the place where negotiation of the contract occurred is a thorny inquiry, and does not weigh in favor of applying any one sovereign's law, as the bunker contract was formed through a series of emails and facsimiles sent by Trans-Tec and Kien Hung through Yee Foo, Trans-Tec's Taiwanese intermediary, at a time when the *Harmony* was docked in Hong Kong. To be sure, the Singaporean nationality of Trans-Tec, the "injured party," is a relevant point of contact. However, standing alone, it fails to outweigh the nature and quality

of the Malaysian contacts: the *Harmony's* Malaysian flag and Splendid's Malaysian nationality.

II. Applying Malaysian Law to Contract Formation

Malaysian law, which relies heavily on English law,[7] instructs us to examine the parties' language and conduct in determining whether the parties intended to incorporate the Terms and Conditions into their contract, even though no copy of that document was exchanged in the flurry of emails and faxes that preceded the refueling. We conclude that the clear and specific language of the Bunker Confirmation, coupled with Kien Hung's acceptance of the fuel bunkers without protest after receiving the Bunker Confirmation, reflect that the contract incorporated the Terms and Conditions as a matter of Malaysian law.

The only relevant Malaysian case makes crystal-clear that Malaysian courts accord dispositive weight to the "words and actings" of the parties in deciding whether they intended to incorporate a clause. *Bauer Sdn Bhd v. Daewoo Corp.*, (Malaysian Court of Appeal 1999) 4 MLJ 545, 560. In *Bauer*, the Malaysian court held that an arbitration clause from a previous work order was not incorporated into later work orders in part because there was an absence of "the

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[7] *See* Tetley at 1331 (stating that Malaysian maritime law is primarily English maritime law).

language that is necessary to reasonably support the finding of an intention to incorporate." *Id.*

In addition, under Malaysian law, "a term may be incorporated not only by words but also by conduct." *Id.* at 559. The court in *Bauer* found instructive an English case involving the incorporation of disputed terms. *Id.* (citing *British Crane Hire v. Ipswich Plant Hire Ltd.*, [1975] Q.B. 303 (Eng.)). Even though one party had not expressed assent to the terms, "the common understanding which is to be derived from the conduct of the parties," *i.e.*, the acceptance of goods without protesting the subsequently mailed conditions, indicated that those terms were incorporated into the contract. *British Crane*, [1975] Q.B. at 311.

Here, both the contract language and the parties' conduct support the conclusion that Trans-Tec's Terms and Conditions were incorporated into the bunker contract. The documents at issue are the Kien Hung order and the Bunker Confirmation. In response to Kien Hung's order, the Bunker Confirmation email unambiguously stated that "[t]his confirmation incorporates seller's standard terms and conditions dated 3 January 2000." That language "reasonably support[s] the finding of an intention to incorporate" the Terms and Conditions. *Bauer*, 4 MLJ at 560.

Kien Hung's conduct also demonstrates that the parties intended to incorporate the Terms and Conditions. *See id.* Kien Hung neither objected to, nor

requested a copy of, the Terms and Conditions after receiving the Bunker Confirmation, even though the Bunker Confirmation expressly stated, "Pls inform us if you require a copy" of the Terms and Conditions. A Kien Hung manager received the Bunker Confirmation one week before Kien Hung accepted delivery of Trans-Tec's fuel bunkers in Busan, giving Kien Hung sufficient time to request the Terms and Conditions, reject any or all of them, or change course entirely. The district court correctly concluded that under Malaysian law, the parties' language and conduct demonstrated that the Terms and Conditions, including the United States choice of law provision, were incorporated as a term of the bunker contract.

III. Giving Effect to the United States Choice of Law Provision

Having determined that the United States choice of law provision was a term of the contract, we address Splendid's argument that we should not give effect to that provision because the transaction is "too foreign" to apply United States law. To take Splendid's approach would steer us off course because it ignores both the long-recognized principle of honoring the expectations of the parties to a contract and the scope of a maritime lien under the FMLA.

A. Recognition of the Choice of Law Provision

Absent a strong showing that it should be set aside, the parties' choice of law provision, as part of a

"freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). This presumption in favor of enforcing contract provisions encourages predictability in the law, particularly in the international arena. *See* RESTATEMENT § 187(2) cmt. e (stating that predictability is best served "by letting the parties choose the law to govern the validity of the contract and the rights created thereby").

That this transaction involved multiple foreign points of contact does not dissuade us from recognizing the parties' agreed-upon law and jurisdiction. In *Liverpool & London S.S. Protection & Indemnity Association v. QUEEN OF LEMAN MV,* 296 F.3d 350 (5th Cir. 2002), the Fifth Circuit upheld a maritime lien asserted by an English insurer against a vessel whose insurance premiums had gone unpaid. Even though the insurance contract was governed by English law, the court honored a provision in the contract that the insurer could "enforce its right of lien in any jurisdiction in accordance with local law in such jurisdiction." *Id.* at 353. By bringing suit in the Eastern District of Louisiana, the insurer was entitled to seek a maritime lien under the FMLA, as United States law was the "local law." The Fifth Circuit declared that "there is nothing absurd about applying the law of the jurisdiction into which the ship sails, as the ship's presence in the jurisdiction represents a substantial contact." *Id.* at 354.

QUEEN OF LEMAN thus counsels that where foreign parties have specified that they want United States law to determine the existence of a maritime lien in a transaction involving multiple foreign points of contact, and the ship has sailed into the United States, it is reasonable to uphold the choice of American law. That a maritime lien might exist on the vessel under United States law, but would not exist under Malaysian law, was a consequence obviously contemplated by the contracting parties, and because the *Harmony* sailed into a United States port, results in no fundamental unfairness.[8]

We agree with the Fifth Circuit's holding in *QUEEN OF LEMAN,* but recognize that it is in tension with the Second Circuit's view in *Rainbow Line, Inc. v. M/V Tequila,* 480 F.2d 1024 (2d Cir. 1973). There, the court refused to apply a United States choice of law clause to decide whether a charterer was entitled to a maritime lien because application of United States law would have adversely affected the rights of a third-party creditor. *Id.* at 1026. Rather than apply the charter's choice of law clause, the Second Circuit conducted a *Lauritzen* analysis to determine which country's law governed

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[8] Our holding in *Tento* supports this conclusion. 694 F.2d 1191. There, in the absence of an express choice of law, we conducted a *Lauritzen* analysis and held that United States law properly applied, notwithstanding the "foreignness" of the transaction: the vessel and its owner were Norwegian, the fuel supplier was Italian, and the fuel was provided in an Italian port. *Id.* at 1196.

the existence of a maritime lien. *Id.* at 1026-27. It is worth noting that the adversely affected party involved in *Rainbow Line* was a third-party lender to a subsequent owner of the vessel, an entity far removed from the original parties to the charter. For the reasons previously stated, we prefer the Fifth Circuit's rule in *QUEEN OF LEMAN*.

A Canadian court that recently faced a similar choice of law provision and an array of foreign players applied the parties' choice of United States law and recognized the existence of a maritime lien under the FMLA. *Kirgan Holding S.A. v. Ship Panamax Leader,* [2002] F.C. 1235 (Can.), *reprinted in* 2002 A.M.C. 2917. Although Canadian law has no precedential value here, the decision is instructive, particularly in light of the relatively uncharted waters presented by this appeal. The court upheld the parties' chosen law, even though, as Splendid would put it, all the points of contact involved were "foreign": the supplier was Panamanian, the vessel was registered under the flags of Malta and Cyprus, the vessel owner was Maltese, the charterer was Caribbean, and the provision of fuel bunkers occurred in Malta. The only contact that the transaction had with Canada, whose law does not provide for a maritime lien for the supply of necessaries, was that the vessel was arrested in a Quebec port. The Canadian court concluded that the provision should be respected. *Id.* We agree with that conclusion and now turn our focus to the FMLA.

B. Application of the FMLA

According to United States maritime lien law, "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel" and "may bring a civil action in rem to enforce the lien." 46 U.S.C. § 31342. Splendid's siren song about the presumption against extraterritorial application of United States law fails to distract us from reaching the clear-cut conclusion that the FMLA's plain language demands: A maritime lien arose in favor of Trans-Tec because it provided necessaries[9] to the *Harmony* on the order of the *Harmony's* charterer. Charterers and their agents are presumed to have authority to bind the vessel by the ordering of necessaries. *Id.* § 31341; *see also* TETLEY at 602-03; THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-3 (4th ed. 2004) ("SCHOENBAUM"). As our decision rests in part on the unique nature of the remedy sought in this case, we offer a brief primer on maritime liens.

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[9] Fuel bunkers are "necessaries" within the meaning of § 31342, as they were "useful" to the *Harmony* and "enable[d] her to perform her particular function." *See Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 603 (5th Cir. 1986) (en banc); *accord Bominflot, Inc. v. The M/V Henrich S*, 465 F.3d 144, 147 (4th Cir. 2006); *Hoegh Shield*, 658 F.2d at 367.

1. Background on Maritime Liens in the United States

A maritime lien is "one of the most striking peculiarities of Admiralty law, constituting a charge upon ships of a nature unknown alike to common law and equity." *Black's Law Dictionary* 943 (8th ed. 2004) (quoting GRIFFITH PRICE, THE LAW OF MARITIME LIENS 1 (1940)). It has been defined as: "(1) a privileged claim, (2) upon maritime property, (3) for service done to it or injury caused by it, (4) accruing from the moment when the claim attaches, (5) traveling with the property unconditionally, (6) enforced by means of an action in rem." *Id.* (quoting Price at 1). The lien gives the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds of the sale. *Equilease,* 793 F.2d at 602.

The maritime lien serves the "dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away." *Id.* In other words, a maritime lien may be considered "a right based upon the legal fiction that the *ship* is the wrongdoer – the ship itself caused the loss and can be called to the bar to make good the loss." SCHOENBAUM § 9-1 (emphasis added).

The United States, through common law and statute, has long recognized and enforced maritime liens. *Id.* As reflected in the earliest Supreme Court cases on maritime liens, this remedy was premised on concern for the vessel. Throughout the nineteenth century, the Court recognized that maritime liens

could arise for the provision of necessaries in "foreign ports," or ports that were not the vessel's home port, in order to keep the vessel fit for sail. *See, e.g., St. Jago de Cuba,* 22 U.S. (9 Wheat.) 409, 416-18, 6 L.Ed. 122 (1824) (stating that the "consideration that controls every other" is that "[t]he vessel must get on"); *The Gen. Smith,* 17 U.S. (4 Wheat.) 438, 443, 4 L.Ed. 609 (1819). Conferring a lien on the vessel to "material-men" ensured the continued maintenance of vessels by encouraging suppliers to provide necessaries in foreign ports. *See The J.E. Rumbell,* 148 U.S. 1, 9, 13 S.Ct. 498, 37 L.Ed. 345 (1893) (observing that maritime liens for necessaries furnished "to keep a vessel fit for sea" took precedence over all other claims except seamen's wages or salvage).

Before 1910, when the FMLA was first enacted, an odd distinction existed in the American law of maritime liens: a maritime lien arose for the provision of necessaries in a port in a foreign country or foreign state, but no lien arose if necessaries were supplied in the vessel's home port. *The Roanoke,* 189 U.S. 185, 193-94, 23 S.Ct. 491, 47 L.Ed. 770 (1903); *The Gen. Smith,* 17 U.S. at 443. As a consequence of this anomaly, a lien on a vessel for the provision of supplies in a port of the vessel's home state could arise only if there were state legislation to that effect. *The Gen. Smith,* 17 U.S. at 443. The significant variance among the state statutes was of concern to the Supreme Court. Lucian Y. Ray, *Maritime Contract Liens,* 47 TUL. L. REV. 587, 589 (1973). In 1874, Justice Bradley, writing for the Court, hinted that

Congress "might adopt a uniform rule for the whole country" to govern maritime liens. *The Lottawanna,* 88 U.S. (21 Wall.) 558, 577, 22 L.Ed. 654 (1874) (Bradley, J.).

Congress responded in 1910 by passing the FMLA. Act of June 23, 1910, ch. 373, § 1, 36 Stat. 604. The legislative purpose was three-fold: (1) to overrule the home port doctrine; (2) to nullify the doctrine that, when a vessel's owner contracted in person for necessaries or was present in the port when they were ordered, it was presumed that the supplier did not intend to rely upon the vessel's credit, such that a lien did not arise; and (3) to substitute a single federal maritime statute for the varying state statutes dealing with necessaries. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1, 11, 41 S.Ct. 1, 65 L.Ed. 97 (1920); *see also Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.,* 310 U.S. 268, 271-72, 60 S.Ct. 937, 84 L.Ed. 1197 (1940) (stating that the FMLA's purpose was to "simplify and clarify the rules as to maritime liens as to which there had been much confusion"). In addition, the FMLA, by favoring suppliers regardless of where necessaries were provided, was intended to boost a faltering merchant marine industry. *Equilease,* 793 F.2d at 602. In effect, the FMLA "was intended to operate in aid of those who supply necessaries to ships and it correspondingly restricted the rights of the owners of the vessels." *Dampskibsselskabet,* 310 U.S. at 273, 60 S.Ct. 937.

In 1920, Congress codified the FMLA as part of the Ship Mortgage Act of 1920, 46 U.S.C. §§ 971-75, but the substance of the lien law was left virtually unchanged until 1971. TETLEY at 604. Under the original legislation, a vessel owner's insertion of a "no lien" clause in the charter-party prohibited suppliers from obtaining a lien if a provider "knew, or by exercise of reasonable diligence could have ascertained" that no lien would be available. *Id.* (emphasis omitted). Under the 1971 amendments, the "reasonable diligence" standard was dropped in favor of an "actual knowledge" standard. The legislation thus voids a "no lien" clause, as long as the supplier did not have knowledge of the clause. H.R. REP. NO. 92-340 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1363. Therefore, even though the charter-party between Splendid and Kien Hung forbade Kien Hung from incurring liens on the *Harmony,* that fact, standing alone, does not prevent Trans-Tec from obtaining a maritime lien in this case, as nothing in the record indicates that Trans-Tec knew of the provision.

In 1988, Congress repealed all previous maritime lien statutes and recodified the prior law on maritime liens as part of the Commercial Instruments and Maritime Liens Act. Pub.L. No. 100-710 (1988), 102 Stat. 4735 (codified at 46 U.S.C. § 31301 *et seq.*). Congressional reports indicated that the new law was not intended to make any substantive changes to the FMLA, and the lien provisions are still generally referred to as "the FMLA." H.R. REP. NO. 100-918

(1988), *reprinted in* 1988 U.S.C.C.A.N. 6104, 6107, 6141; TETLEY at 587-88.

2. APPLICATION OF THE FMLA

The language of the FMLA is clear and unambiguous:

> [A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31342. The statute imposes no restriction on the nationality or other identity of the supplier or the vessel, and no geographic restriction on the place of provision of the necessaries. Splendid endeavors to shoehorn the FMLA into a narrower statute than it is by arguing that the FMLA does not give a maritime lien to a foreign necessaries provider for the provision of supplies to a foreign vessel in a foreign port. However, we are not persuaded by Splendid's constrained and unsupported view of United States maritime lien law.

In accord with Supreme Court teachings, *see, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 8, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), we begin our analysis with the

language of the statute. "[A] person providing necessaries" means any person, not only an "American person." The FMLA, by its plain language, is not restricted in application to United States citizens, American companies, or companies doing business in the United States. Though Congress may have had American suppliers in mind, the statute, on its face, recognizes a maritime lien in favor of *any* person providing necessaries.

Although we need not look beyond the plain language of the statute, we address Splendid's argument that the House Report's mention of "American materialmen" is reason to deny Trans-Tec a maritime lien. *See* H. REP. NO. 92-340 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1363 (stating that enactment would "be of great assistance to American materialmen in collecting amounts owed on necessaries"). Splendid fails to point out that the Report did not exclude foreign "materialmen" from its reach, and the Committee's reasons for protecting American suppliers extend to foreign suppliers, as well:

> Granting the materialman a lien encourages the prompt furnishing of necessaries to vessels so that they can be speedily turned around and put to sea. This is especially significant today when the emphasis on vessel performance is reduced port time and increased speed.

Id. Given Congress's expressed hope that the amended Act would "encourage[ ] the prompt furnishing of necessaries to vessels so that they can be

turned around and put to sea," *id.*, it would undo Congress's aim to recognize maritime liens only in favor of American materialmen. In any event, this passing reference hardly overrides the unambiguous language of the statute.

The statute also states that a maritime lien arises upon the provision of necessaries to "a vessel." Again, the statute's language is not limited to American vessels. Though § 31342 mentions only "a vessel," the "inference to be drawn from the legislative history is that section 31342 will be interpreted similarly to former sect. 971," which stated that the lien applied to "any vessel, whether foreign or domestic." TETLEY at 597. An abundance of case law has recognized a maritime lien under the FMLA where necessaries have been provided to a foreign-flagged vessel. *See, e.g., Hoegh Shield,* 658 F.2d at 368 (holding that maritime lien arose on Norwegian vessel); *Loginter S.A. v. M/V Nobility,* 177 F.Supp.2d 411, 415 (D. Md. 2001) (Maltese vessel); *Mobil Sales & Supply Corp. v. Vessel PANAMAX VENUS,* 1986 A.M.C 420, 423 (C.D. Cal. 1985) (Liberian vessel).

Finally, the statute does not discriminate between the provision of necessaries in the vessel's home port and a foreign port. As previously noted, Congress expressly jettisoned the "home port doctrine" with the passage of the FMLA in 1910, thus allowing maritime liens regardless of whether necessaries were provided in the vessel's home port or in a foreign port. *See* TETLEY at 597. Cases in the wake of

the FMLA's passage have faithfully recognized maritime liens where necessaries have been provided in foreign ports. *See, e.g., Ryan-Walsh, Inc. v. M/V Ocean Trader,* 930 F.Supp. 210, 219 (D. Md. 1996) (oil provided to vessel in Indonesia); *Mobil Sales,* 1986 A.M.C. at 423 (oil provided to vessel in China and Japan). In sum, putting together the pieces of this statutory puzzle makes evident that because Trans-Tec provided necessaries to the *Harmony* on the order of its charterer, a maritime lien arose in favor of Trans-Tec.

Splendid posits that applying the FMLA to a foreign supplier providing necessaries in a foreign locale to a foreign flag vessel would somehow result in the "extraterritorial" application of United States maritime lien law. Splendid's argument obscures several important points, including the nature of admiralty law and the high seas, the parties' agreement to apply United States maritime lien law, and the fact that the *Harmony* routinely sailed into a United States port and was subject to *in rem* jurisdiction in California when the *Harmony*'s insurers posted a bond to avoid its seizure.

Nothing in the statute supports Splendid's argument that the FMLA does not apply to situations involving a foreign vessel, a foreign supplier, and provision in a foreign port. Other courts facing similar scenarios have given the FMLA the fair reading that its plain language demands, and have found no reason to narrow it. *See, e.g., QUEEN OF LEMAN,* 296 F.3d at 352-53 (stating that if United States law

applied, the FMLA would create a maritime lien for the insurance provided); *Kirgan Holding*, [2002] F.C. 1235 (holding that a maritime lien arose under the FMLA for the provision of fuel bunkers to a foreign-flagged vessel in Malta).

Hardly any area of law could be viewed as more extraterritorial than admiralty law. It is well settled that the admiralty jurisdiction of United States courts extends to the high seas: "The traditional domain of admiralty jurisdiction is, of course, the sea. . . . " SCHOENBAUM § 3-3. Save for inland navigable waters, ports, and a few other locations, admiralty jurisdiction by definition extends beyond United States territorial boundaries. Tethering United States maritime lien law to situations involving only American-flagged vessels, American suppliers, or American ports would threaten the ability of foreign vessels to move freely from port to port without the fear of going without necessaries. *See St. Jago de Cuba*, 22 U.S. at 416 (stating that "the consideration that controls every other" is that "[t]he vessel must get on").

Splendid argues that extension of the FMLA to "completely foreign transactions" seriously interferes with other nations' regulation of their commercial affairs because United States law allows for maritime liens for the provision of necessaries, and most other nations do not. But recognizing a maritime lien on the *Harmony* does not interfere with Malaysian law, which we applied at the outset to incorporate the United States choice of law provision, or the law of any other nation implicated in this transaction. This

case presents no extraterritorial "problem" of the ilk that has troubled the Supreme Court because here the parties chose United States law to control their transaction, and the vessel sailed to a United States port. *Cf. F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004) (holding that foreign vitamin distributors could not bring a claim under the Foreign Trade Antitrust Improvements Act for solely foreign injury). Our conclusion does not curb the sovereignty of any other nation, or another country's ability to regulate its maritime affairs. In fact, recognition of freely negotiated contract terms encourages predictability and certainty in the realm of international maritime transactions.[10]

Splendid also has forgotten the crucial fact that this transaction was not "completely foreign." The subject of this *in rem* action is the vessel *Harmony*. Between October 2002 and March 2003, the *Harmony*

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[10] Given that approximately thirty nations recognize a maritime lien for the provision of necessaries, other countries have options, if desired, to address this circumstance. For example, a country could simply prohibit contracting parties from choosing United States or foreign maritime lien law in their contracts. Alternatively, national law could require charterers to inform suppliers of existing no-lien clauses in the charter-party. And, in the private arena, ship owners could take steps to give suppliers notice of the no-lien provisions, thus effecting actual notice of the provisions and preventing charterers from burdening the ship with maritime liens. *See* 46 U.S.C. § 31341 (stating that charterers are only *presumed* to have authority to bind the vessel).

transported $48.9 million in goods to and from Long Beach, California. That the *Harmony* was docked at Long Beach at the time that Trans-Tec filed suit was not mere happenstance: Long Beach was a regular stop on the *Harmony*'s route. These contacts with the United States, along with the parties' express agreement to apply United States maritime lien law, put to rest any fears that an American court is unilaterally imposing the FMLA on other nations.

Our reliance on the plain language of the statute is all the more justified when one considers that the tangled web of American case law[11] that bears on this issue is not particularly helpful in sorting out the answer. *Compare Conti-Lines S.A. v. M/V BARONESS V,* 1992 A.M.C. 681, 683 (M.D. Fla. 1991) (holding that the "plain language of the statute and the history of the Federal Maritime Lien Act" allow foreign necessaries providers to obtain maritime liens) *with Swedish Telecom Radio v. M/V Discovery I,* 712 F.Supp. 1542, 1548 (S.D. Fla. 1989) (stating that

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[11] We appreciate the straightforward approach of the Canadian federal court that evaluated a strikingly similar situation in *Kirgan Holding,* [2002] F.C. 1235, *reprinted in* 2006 A.M.C. 812. After first deciding to enforce the parties' United States choice of law clause, the court determined that under the FMLA, a maritime lien arose in favor of the necessaries provider, without discussing any "extraterritorial" implications of doing so. *Id.* Despite Splendid's assertion that the case was overruled by *J.P. Morgan Chase Bank v. Mystras Maritime Corp.,* [2006] F.C. 409, *Kirgan* was merely distinguished on its facts. Though the outcomes of the two cases are difficult if not impossible to reconcile, we are persuaded by *Kirgan.*

the FMLA "was not intended to provide maritime liens for goods and services where . . . they are supplied by foreign companies in foreign ports") (citations omitted).

Both the district court and Splendid rely on an Eleventh Circuit case, *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla,* 966 F.2d 613 (11th Cir. 1992), as the foundation for their conclusion that the FMLA does not apply to this transaction.[12] The most telling aspect of *Trinidad* is that the court acknowledged that the FMLA was not even in play: "§ 31342 is not even applicable to this case because, as we have already held, English law governs." *Id.* at 617. In *Trinidad,* a Trinidadian corporation made repairs to a Norwegian vessel whose owners failed to pay. *Id.* at 614. Despite the contractual designation of English law, which does not recognize a maritime lien for repairs, the supplier sought a maritime lien under the FMLA. The court stated that "§ 31342 does not provide for a maritime lien for goods and services supplied by a foreign plaintiff to foreign flag vessels in foreign ports." *Id.* at 617 (citing *Tramp Oil & Marine, Ltd. v. M/V Mermaid I,* 805 F.2d 42, 46 (1st

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[12] The district court also cited to BENEDICT ON ADMIRALTY, which states that there is no maritime lien under the FMLA for a supplier of goods and services to a foreign flag vessel in a foreign port. 2 BENEDICT ON ADMIRALTY § 38, at 3-35 (7th ed.1997). *See also* SCHOENBAUM § 9-8. Neither treatise addresses the circumstances of a contractual choice of FMLA as controlling law and neither offers any substantive analysis, instead basing its reasoning on *Trinidad.*

Cir. 1986); *Swedish Telecom,* 712 F.Supp. at 1545-46). Having already determined that United States law was not applicable, the court's commentary – without any analysis – on § 31342 could hardly be less persuasive. One can argue about what is or is not dictum,[13] but it seems to us that a clearer case than this one cannot be found. Not only did the court recognize that United States law did not apply, but it did not even analyze § 31342, the statute at issue here.

The two cases cited as authority in *Trinidad* do not bolster its stray commentary. The plaintiff in *Tramp* was an English fuel broker that hired an American supplier to provide oil to a vessel. 805 F.2d at 44. Tramp paid the supplier, but Tramp was never paid, so it sought a maritime lien against the vessel. The First Circuit stated that under the FMLA, a supplier would be entitled to a maritime lien for providing fuel to the vessel. *Id.* However, because it was the intermediary that was unpaid, and not the fuel supplier, the FMLA did not apply to give the broker the "suppliers' rights to the lien": "We therefore think it unnecessary to protect American suppliers, and unfair to the vessel, to extend the availability of a maritime lien directly to an intermediate broker

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[13] *See, e.g., United States v. Johnson,* 256 F.3d 895, 914-16 (9th Cir. 2001) (en banc) (Kozinski, J., concurring); *United States v. Crawley,* 837 F.2d 291, 293 (7th Cir. 1988) (Posner, J.) (defining dictum as "not a fully measured judicial pronouncement . . . not likely to be relied on by readers, and . . . may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended (if a federal court)").

unknown to the vessel." *Id.* at 44, 46. The location and nationality of the supplier were not at issue. Instead, the lack of a relationship between the vessel and the intermediate broker meant that the broker could not obtain a maritime lien for merely arranging the provision of fuel to the vessel. *Id.* at 46 (noting that extending the suppliers' lien to intermediate brokers "could radically change the presuppositions of maritime commerce"). *Tramp* thus sheds no light here.

Similarly, the Eleventh Circuit misread *Swedish Telecom,* the other case cited in *Trinidad.* As in *Trinidad,* the court ultimately decided that Swedish law – not United States law – governed the transaction. Nonetheless, as in *Trinidad,* the court offered the totally irrelevant view that "a foreign supplier of goods is precluded from acquiring a lien under the federal Act even if it supplies goods or services in an American port." *Swedish Telecom,* 712 F.Supp. at 1546. We are left with the firm conclusion that *Trinidad* is a house of cards that quickly tumbles with even the gentlest examination. Here, where the contract specified that "the laws of the United States" were to determine the existence of a maritime lien, our reliance on the plain language of the United States statute, rather than a case applying English law, comports with predictable judicial reasoning.

IV. Discovery Dispute

The district court did not abuse its discretion by refusing Trans-Tec's request under Rule 56(f) for more time to take discovery. Trans-Tec has not shown that it diligently pursued its previous discovery opportunities, nor that further discovery is likely to produce evidence that would preclude summary judgment. *See Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994).

Conclusion

We agree with the district court's conclusions that Malaysian law governs the issue of contract formation, and that under Malaysian law, the United States choice of law provision was incorporated as a term of the bunker sale contract. We reverse the district court's holding that no maritime lien arose under the FMLA, and remand for proceedings in accordance with our decision.

REVERSED in part, AFFIRMED in part, and REMANDED. Each party shall bear its own costs on appeal.

TRANS-TEC ASIA, Plaintiff,
v.
M/V HARMONY CONTAINER Its freights, engines, apparel, and tackle, Defendant in rem
Splendid Shipping Sendirian Berhard, Defendant, and
The Master of the M/V Harmony Container, Garnishee.

No. CV 04-1160 SVW(MANX).

United States District Court,
C.D. California.

Feb. 2, 2006.

Maria Del Rocio Ashby, McKasson Klein and Holmes, Costa Mesa, CA, for M/V Harmony Container, Splendid Shipping Sendirian Berhad, Defendants.

Gary R Clouse, Isaacs Clouse & Crose, Santa Monica, CA, for Trans-Tec Asia, Plaintiff.

Neil B Klein, McKasson Klein and Holmes, Costa Mesa, CA, for M/V Harmony Container, Splendid Shipping Sendirian Berhad, Defendants.

Bradley M Rose, Kaye Rose & Partners, Los Angeles, CA, for M/V Harmony Container, Splendid Shipping Sendirian Berhad, Defendants.

J Stephen Simms, Simms Showers, Baltimore, MD, for Trans-Tec Asia, Plaintiff.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WILSON, District Judge.

I. INTRODUCTION

This admiralty case arises out of a dispute over unpaid bunkers (fuel). Plaintiff Trans-Tec Asia ("Trans-Tec") sold bunkers to the charterer of the M/V Harmony Container ("Vessel"), the Kien Hung Shipping Company Ltd. ("Kien Hung"). Kien Hung later went bankrupt. Its bunkers still unpaid, Trans-Tec filed this action against the Vessel and its Owner, Defendant Splendid Shipping Sendirian Berhard ("Splendid").

In its Order of August 15, 2005 ("August 15 Order"), the Court determined that Malaysian law applied to the dispute. In its Order of October 20, 2005 ("October 20 Order"), the Court granted summary judgment to Splendid on the issue of unjust enrichment. In its October 20 Order, the Court also informed the parties that it would reconsider its prior decision that Unites [sic] States law governed the incorporation of a choice of law clause into a contract between Trans-Tec and Kien Hung. Specifically, the Court ordered the parties to further brief the following topics:

1. What law should apply to determining the terms of the Bunker Contract, specifically whether the choice of law clause was a term of the Bunker Contract?

2. If Malaysian law would apply, would the choice of law clause be a term of the contract?

3. If the choice of law clause were considered part of the contract, would a maritime lien against the Vessel be available?

The Court finds that Malaysian law determines the terms of the Bunker Contract, including whether the choice of law clause was a term, that Malaysian law renders the choice of law clause a term of the contract, and that applying United States law (the law chosen by the choice of law clause) does not create a maritime lien on the Vessel in favor of Trans-Tec. Thus, the Court GRANTS summary judgment to Defendants.

II. FACTS

In July 2000, Splendid entered into a New York Produce Exchange charter party contract with Kien Hung for a ten-year charter of the Vessel (the "Charter Agreement").

On February 17, 2003, Trans-Tec agreed to supply Kien Hung with bunkers for the Vessel (the "Bunker Contract"). The Bunker Contract was formed as follows: C.L. Wu ("Wu"), a manager for Kien Hung in its Taiwan office, faxed a bunker inquiry ("Bunker Inquiry") to Vivian Huang ("Huang") of Yee Foo Marine Industrial Co. Ltd. ("Yee Foo"), Trans-Tec's

representative in Taiwan throughout 2002 and 2003.[1] Huang was at that time the account representative to Kien Hung. The Bunker Inquiry requested a quote for bunkers to be provided to the Vessel for bunkering at Busan, South Korea on February 24, 2003. Huang faxed the Bunker Inquiry to Margaret Quek ("Quek") of Trans-Tec's Singapore office. Quek provided Huang with a bunker quote. Huang communicated the quote to Wu. In response, Wu faxed Huang a bunker order ("Bunker Order"). The Bunker Order stated: "Many thanks for your quotation on Feb/17/2003. Please arrange the follows [sic] and confirm by return." (Huang Decl. ¶ 7, Ex. C.) Huang then faxed the Bunker Order to Quek. Quek sent an email to Huang confirming the sale of 1150 metric tons of Grade 380CST RMG35 bunker fuel for the Vessel ("Bunker Confirmation"). Huang then faxed the Bunker Confirmation to Wu.

The Bunker Confirmation provided:

> This confirmation incorporates seller's standard terms and conditions dated January 3, 2000. Pls inform us if you require a copy.
>
> All sales are on the credit of the vessel. Buyer is presumed to have authority to bind the vessel with a maritime lien. Disclaimer stamps placed by the vessel on the bunker

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[1] Defendants characterize Yee Foo as Kien Hung's representative. However, Huang states in her declaration that Yee Foo is Trans-Tec's representative in Taiwan. (Huang Decl. ¶ 3.)

> receipt will have no effect and do not waive the seller's lien.
>
> Pls advise this office immediately of any errors, omissions or changes involving any of the items above.

(Ashby Decl. ¶ 4, Ex. B.) All of these exchanges took place on February 17th.

Trans-Tec's standard terms and conditions are allegedly set forth in a document entitled "The Trans-Tec Services Group of Companies General Terms and Conditions" ("Terms and Conditions"). The Terms and Conditions state:

> Effective January 3, 2000, the following terms of sale and supply shall constitute the General Terms and Conditions ("General Terms") of the Trans-Tec Service Group of companies, headquartered at 700 S. Royal Poinciana Blvd., Miami Springs, Florida 33166 including but not limited to Trans-Tec Services, Inc.; Trans-Tec Services (UK) Ltd.; Trans-Tec International S.A.; Casa Petro S.A. and Trans-Tec Asia, a division of World Fuel Services (Singapore) Pte. Ltd. Unless otherwise agreed, the General Terms shall apply to every sale of marine petroleum products ("Products") entered into between a particular Trans-Tec Group company as seller ("Seller"), and any buyer of such Products ("Buyer").

(Ashby Decl. ¶ 6, Ex. C.) The Terms and Conditions contain, among other things, a Choice of Law Clause. The Choice of Law Clause provides:

> 17. Law and Jurisdiction: Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each Transaction shall be governed by the laws of the United States and the State of Florida, without reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which the Seller takes legal action.

(Ashby Decl. ¶ 6, Ex. C, ¶ 17.)

The bunkers were provided on February 24, 2003, in Busan, Korea. Kien Hung subsequently went bankrupt and Trans-Tec was never paid.

III. DISCUSSION

A. Which Law Should Govern the Interpretation of the Bunker Contract?

When Trans-Tec and Kien Hung entered into the Bunker Contract, the confirmation from Trans-Tec to Kien Hung stated:

> This confirmation incorporates seller's standard terms and conditions dated January 3, 2000. Pls inform us if you require a copy.

(Ashby Decl. ¶ 4, Ex. B.) One of those standard terms and conditions was a choice of law clause. In this

Court's August 15 Order, the Court determined that the choice of law clause was not incorporated into the agreement between Trans-Tec and Kien Hung. The Court analyzed the issue under United States law. Because the Court went on to determine that Malaysian law governed the dispute between Trans-Tec and Splendid, Trans-Tec now argues that the Court should have determined whether the choice of law clause was part of the contract based on Malaysian law. What is potentially at stake here is the availability of a maritime lien against the Vessel, a remedy not generally available under the law of jurisdictions other than the United States (United States law was chosen in the choice of law clause).[2] *See* 1 Admiralty & Mar. Law § 9-8 (4th ed.) (Thomas J. Schoenbaum ed.)

In the Court's August 15 Order, it applied United States federal law to the question of whether the Bunker Contract included the choice of law provision (which was among the "standard terms and conditions" referred to in communication from Trans-Tec to Kien Hung, *see supra*). Contrary to Trans-Tec's assertion in its request for the Court to reconsider its ruling, the Court did not apply United States law

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[2] While the Court's August 15 Order specifically found that Splendid was not a party to the contract between Trans-Tec and Kien Hung and thus could not be liable under the provisions of that contract, this claim is an *in rem* action against the Vessel. Therefore, the fact that Splendid is not liable under the contract does not presumptively keep the Vessel from being affected by the contract.

because that was the law referenced in the choice of law clause. Rather, the Court applied United States law because it interpreted Ninth Circuit precedent to mandate that the validity of a choice of law clause be analyzed using federal common law – in this case, federal maritime law – when construing a choice of law clause, per *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

In its August 15 Order, the Court relied on *Richards v. Lloyd's of London,* 135 F.3d 1289 (9th Cir. 1998), and *Batchelder v. Kawamoto,* 147 F.3d 915 (9th Cir. 1998). *Richards v. Lloyd's of London* involved a situation in which no party disputed that the choice of law clause was part of the written contract; the question was one of whether United States public policy voided the clause. 135 F.3d at 1294. No question of contract law was raised.

In *Batchelder v. Kawamoto,* the plaintiff did plead that he was not provided with the choice of law provision and did not consent to it. 147 F.3d 915. These allegations could be considered to go to basic contract formation issues. The contract in question in *Kawamoto* employed a double choice of law clause: New York law for the contract generally and Japanese law for shareholder suits specifically. In addressing the issue of consent and knowledge, the court relied on a United States Securities & Exchange Commission release regarding contracts such as the one at issue, and also cited Ninth Circuit cases relying on *Bremen. Id.* at 919. While one could stretch this and say that the *Kawamoto* court's analysis is precedent

for the proposition that any contract issue involving a choice of law clause is governed by federal law under *Bremen*, the parties in *Kawamoto* do not appear to have raised any issues regarding what law should be used to determine whether the plaintiff had consented to the term. The *Kawamoto* court did not discuss its reasoning for applying United States law and does not appear to have considered whether that was the appropriate body of law.

Finally, *Bremen* itself does not stand for so broad a proposition. *Bremen* was a case in which a United States-based company contracted with a German corporation to tow its drilling rig from Louisiana to Italy. 407 U.S. at 4, 92 S.Ct. 1907. The contract contained a forum-selection clause, selecting the London Court. The U.S. corporation sued in Florida and the district court judge refused to enforce the forum-selection clause. The Supreme Court's ruling in *Bremen* enforced the forum-selection clause and announced a federal common law rule that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given effect." *Id.* at 12-13, 92 S.Ct. 1907. The analysis engaged in by this Court to determine whether the choice of law clause was part of the contract was far removed from a *Bremen* analysis – instead, it was a UCC-based "battle of the forms" analysis. It seems that Trans-Tec is correct that the Ninth Circuit cases relied on by the Court in its August 15 Order do not definitively speak to the question of what law should be used to answer

the basic question of whether choice of law was a term of the contract.

The Ninth Circuit does not appear to have spoken on this issue. In a First Circuit case construing the terms of a cruise ticket, the court first engaged in a choice of law analysis, found Swedish law applied to the cause of action, and then remanded the case to the district court for a determination of whether, under Swedish contract law, the pertinent term would be considered part of the contract. *Jansson v. Swedish Am. Line,* 185 F.2d 212, 219-20 (1st Cir. 1950). A later case in the First Circuit cited *Jansson* with approval and reasoned by analogy for purposes of deciding whether to give effect to the choice of law clause. *DeNicola v. Cunard Line Ltd.,* 642 F.2d 5, 8 n. 2 (1st Cir. 1981). Following the *Jansson* precedent, the *DeNicola* court assessed the contacts with various countries and determined that U.S. law should control whether the clause selecting English law would be given effect. *Id.* Based on this authority, the Court determines that the law that governs the transaction should be used to determine the terms of the contract. Thus, the Court will apply Malaysian law to determine whether the choice of law clause is part of the Bunker Contract.

B. Applying Malaysian Law. Is the Choice of Law Clause Part of the Bunker Contract?

Defendants argue that under Malaysian law, the choice of law clause would not be incorporated into

the Bunker Contract because (1) the incorporation language did not clearly state that one of the terms being incorporated was a choice of law clause; and (2) the choice of law clause was collateral to the contract, not germane to the Bunker Contract's subject matter. According [sic] the Defendants' interpretation of Malaysian law, if a collateral term is not explicitly incorporated by reference then it is not incorporated. Defendants analogize from cases in Malaysia, Singapore and England that take this stance with respect to arbitration clauses. Defendants assert that arbitration clauses and choice of law clauses are functionally similar in that they affect the rights of the parties in a dispute, not the expectations of the parties when performing the contract.

Plaintiff counters by arguing that analogizing between arbitration clauses and choice of law clauses is inappropriate. First, Plaintiff points out that in Malaysia, Singapore, and England, arbitration clauses are typically not actually "clauses" but separate agreements. Second, Plaintiff argues that the effect of an arbitration clause ousting the jurisdiction of the courts is significantly different than applying a different set of substantive laws to a dispute.

Properly ascertaining Malaysian law on the incorporation of terms from one contract into another is made more difficult because, based on the cases cited by both parties, it appears that no Malaysian court has really spoken to this issue, not even under circumstances that allow for analogy. However, both parties freely cite English and Singaporean cases for

indications of Malaysian law and one of the only Malaysian cases cited, *Bauer Sdn Bhd v. Daewoo,*[3] also relied heavily on English cases. (Joseph Oct. 17 Decl. Ex. 35.) Thus, this Court can comfortably look to English law and, to some extent, Singaporean law to predict Malaysian law.

While there is occasional conflicting language in the cases, the most consistent reading of the cases submitted by the parties is that the policy of the Malaysian, Singaporean and English courts not to allow parties to incorporate arbitration by reference does not apply to this dispute. It is unnecessary to decide whether a Malaysian court would consider arbitration clauses and choice of law clauses as sufficiently similar to recommend similar approaches; even if this were an arbitration clause, rather than a choice of law clause, the Court's interpretation of the law is that a Malaysian court would allow the arbitration clause to be incorporated by reference.

The root of the doctrine requiring specific language in order to incorporate arbitration clauses seems to stem from two concerns that are relevant to this case: (1) that when terms are incorporated from one contract to another, it can generally be assumed that the relevant terms for incorporation are the substantive terms germane to the contract's subject matter, not the jurisdictional terms; and (2) that the wording of arbitration clauses typically specifies

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[3] (1994) 4 MLJ 545.

disputes "arising out of this contract," so that to incorporate one contract's arbitration clause into another contract requires the meaning of the clause to be somewhat manipulated (so that disputes arising out of this *other* contract *also* require arbitration). Essentially, this all boils down to intent. Not "intent" such that the party signing the second contract (which incorporates terms from another contract) actually knows what the terms are, but "intent" in the sense that if both parties sat down and read both the second contract and the contract from which terms were being incorporated, the parties would recognize that the language of incorporation covers the arbitration clause. The clearest evidence in the case law that these are the concerns animating the policy is that a consistent refrain throughout the cases is that an arbitration clause is appropriately incorporated into another contract if the language of incorporation is specific ("this contract incorporates all the rights and duties of this other contract, including the arbitration clause") *or* if the language of the arbitration clause, in the first contract, is specific ("any disputes arising out of this contract or a bill of lading related to this contract must be submitted to arbitration").

For example, at first blush, *The Annefield*,[4] an English case in which a bill of lading was said to

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[4] (1971) 1 Lloyd's Rep 1.

incorporate the terms of the charter-party, is one of Defendants' strongest cases. Lord Denning wrote:

> [A] clause which is directly germane to the subject-matter of the bill of lading (that is, to the shipment, carriage and delivery of goods) can and should be incorporated into the bill of lading contract, even though it may involve a degree of manipulation of the words in order to fit exactly the bill of lading. But, if the clause is one which is not thus directly germane, it should not be incorporated in the bill of lading contract unless it is done explicitly in clear words either in the bill of lading *or in the charter-party.*

(Joseph Sept 26 Decl. Ex. 30 at 49 (emphasis added).) A charter-party contract is between the vessel's owner and the charterer, so it is quite possible that the party entering into the bill of lading would not typically have ready access to the charter-party contract. Yet, as Lord Denning stated in the language above and as he reiterated later in the opinion, clear language in the charter-party contract that the arbitration clause should be incorporated into the bill of lading would have been enough to incorporate the arbitration clause, even if the language in the bill of lading was not specific as to arbitration. Lord Denning's holding would make no sense unless the notice and the intent inquiries were not focused on *actual* notice or actual surprise, but just on notice or

surprise if you assume that both parties read both documents.[5]

Another case that at first seems to support Defendants' argument is *Anonymous Greek Company of General Insurances "The Ethniki" v. AIG Europe (UK) & Others,*[6] an English reinsurance case in which the underlying insurance contract had a clause in the "conditions" section selecting Greece as the jurisdiction for any disputes and the reinsurance contract said: "CONDITIONS: wording as original." The court found that the jurisdiction clause was not incorporated into the reinsurance contract, commenting that "[i]n my view it is to be inferred that the function of the incorporating words was confined to ensuring that the substantive or subject-matter terms of the reinsurance matched the substantive or subject-matter terms of the primary cover, except where expressly provided to the contrary." (Joseph Sept. 26 Decl. Ex. 32 at 117.) When later discussing whether the incorporation of a jurisdiction-selection clause should be interpreted like an arbitration clause for these purposes, the court explained that the central

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[5] In a later English case, *OK Petroleum,* the court discussed *The Annefield* and quoted the lower court judge in *The Annefield:* "In the end, it seems to me that one has to ask oneself what an ordinary businessman, *having both documents before him,* would think with regard to the applicability of the arbitration clause in the charter-party to bill of lading disputes." (Joseph Sept. 26 Decl. Ex. 29 at 39 (emphasis added in *OK Petroleum*).)

[6] (2000) I.L. Pr 426.

question was: "did the parties to the contract in which the general words of incorporation appear intend that their contract should include the particular term from the other contract referred to?" and goes on to say:

> the [jurisdiction-selecting] clause does nothing to define the risk, and if regard is had to its terms, they are wholly inappropriate to disputes arising between insurers and reinsurers under the reinsurance contract (as distinct from disputes under the original insurance, which could be binding on reinsurers notwithstanding that they were decided by Greek courts).

(*Id.* at 118.) While the analysis in *Ethniki* is admittedly more favorable to Defendants' position than that in *The Annefield,* the analysis is focused on whether the jurisdiction clause is germane to the reinsurance contract not because of concerns about notice *per se,* but because of concerns that the clause's collateral status would not make it clear that it was incorporated.

A leading English case *OK Petroleum,* perhaps expresses this concept best. The specific facts of *OK Petroleum* make much of its analysis irrelevant for purposes of the case at hand – in *OK Petroleum,* the contract incorporating the terms of the charter-party contract was entered into *before* the charter-party contract had been entered into, making it impossible that any notice could have been provided – but the court's analysis is useful. In canvassing the case law on the general topic of incorporating the terms of one

contract into another, the court summed up the rationale for the doctrine of only incorporating terms germane to the subject matter of the contract, absent specific wording otherwise:

> the Courts impute to the parties to the incorporating contract a mutual intention by their use of *general words* of incorporation to be bound only by the relevant *subject-matter* of the incorporated contract because the parties are taken to treat those matters which are merely collateral or ancillary to the subject-matter as, for that reason, intrinsically personal to the parties to the incorporated contract and therefore not self-evidently germane to be incorporated into their own contract.

(Joseph Sept. 26 Decl. Ex. 29 at 45 (emphasis in original).)

Unlike all of the cases relied on by Defendants, the instant case involves a stand-alone document of terms and conditions. This document has no reason to exist beyond encompassing the terms and conditions that Trans-Tec wants to attach to all its dealings. It is not possible that, had Kien Hung looked at the sheet with the standard terms and conditions on it, Kien Hung would not have understood that the choice of law clause was intended to be incorporated. When Kien Hung agreed to the incorporation of the standard terms and conditions, it is not possible that Kien Hung did not expect that *all* of the standard terms and conditions would apply to the transaction. This is

not a situation in which the standard terms and conditions were embedded in another free-standing contract and thus the wording of some of the terms and conditions might make it unclear whether the term was applicable to this other, separate contract. The Court's reading of the cases submitted by both parties is that even if this were an arbitration clause rather than a choice of law clause, the arbitration clause would be considered incorporated.

The Court recognizes that one case from Singapore submitted by Defendants analyzes the English cases differently than the Court does:

> Although nowadays other forms of dispute resolutions are no longer perceived as a threat to the court's jurisdiction, recourse to the courts remain [sic] the default route for anyone seeking to assert his legal rights. Any agreement to change or deviate from this avenue must be explicit, *and, in my view, arbitration clauses*[,] *like exemption clauses, must be expressly brought to the attention of the other contracting party.*

(Joseph Oct. 17 Decl. Ex. 37 at 45 (emphasis added).) In the Court's view, this is an incorrect analysis of the English cases and, since the Singapore court's analysis is based on English cases, and Malaysian courts presumably rely more heavily on the English cases themselves, rather than another country's interpretation of those cases, the Court dismisses the analysis in this case as both wrong and irrelevant.

[1] Because both parties would have expected all the Terms and Conditions to apply to the Bunker Contract (including the choice of law clause) had they looked at both the Bunker Contract and the Terms and Conditions, Malaysian law would not exclude the choice of law clause (or an arbitration clause) based on the doctrine of requiring specific reference in order to incorporate ancillary terms from another contract.

Now, the Court must determine if, absent the "arbitration clause doctrine" excluding the choice of law clause, the clause is part of the contract.

Defendants, either confident in their argument that the arbitration doctrine would exclude the choice of law clause or without a colorable argument for excluding the choice of law clause on any other basis, do not address the question of how the Court should determine the clause's fate without the arbitration clause doctrine. The Plaintiff, however, does address the question, and argues that the choice of law clause, as well as all the other standard terms and conditions, became part of the Bunker Contract by virtue of the conduct of the parties.

To properly assess this argument regarding the conduct of the parties, the Court first steps back to recall the specific circumstances of this case: the Bunker Contract was one which, if the analysis of its terms were under U.S. law, would be conducted as a "battle of the forms." That is, Kien Hung ordered the bunkers from Trans-Tec (after receiving a quote) and Trans-Tec sent a confirmation of Kien Hung's order to

Kien Hung. It was in this confirmation that the "standard terms and conditions" were referenced. It deserves note that this section of the confirmation did not just say that the order was subject to the standard terms and conditions dated January 2000; it also said "pls inform us if you require a copy." The inquiry, order, and confirmation were all exchanged on February 17, 2003, and the bunkering was not scheduled until February 24, 2003 (a week later) – thus, Kien Hung had time to request a copy of the Terms and Conditions.

Plaintiff argues that because Kien Hung did not request a copy of the Terms and Conditions or otherwise object after receiving the confirmation, Trans-Tec could legitimately rely on this inaction as acquiescence to Trans-Tec's terms and conditions. Terms can be incorporated through the conduct of parties, as remarked on by the Malaysian case *Bauer* and English case *British Crane Hire.* Plaintiff primarily relies on *British Crane Hire,* a case in which the defendant rented a crane from the plaintiff. (Anatham Decl. at 106.) After delivery of the crane and the occurrence of the problems with the crane which engendered the lawsuit, defendant received plaintiff's written form of terms and conditions. No prior mention of the terms and conditions had been made. The court found the terms and conditions at issue were implicitly incorporated into the contract between the two parties because testimony showed that plaintiff's terms and conditions were customary in the industry and defendant was operating under an assumption of such

parameters of liability and responsibility. (*Id.* at 114.) The facts of *British Crane Hire* are not particularly helpful to Plaintiff's case – indeed, if the confirmation had come after the provision of the bunkers (and thus at a point when Kien Hung's request for a copy of the terms and conditions would have been futile), it seems unlikely that Plaintiff could prove that choice of U.S. law was generally assumed to be part of a bunker contract. *British Crane Hire* does establish, however, the simple proposition that the conduct of the parties can, in appropriate circumstances, incorporate terms into a contract.

Even acknowledging that Kien Hung was in arrears with Trans-Tec and thus the parties were not on equal bargaining ground, it is fair to take Kien Hung's lack of response to the confirmation as an acquiescence to the full terms and conditions. None of the foreign authorities submitted by the parties have indicated any reason other than the "arbitration clause doctrine" for not incorporating terms into a contract. Because Defendants do not present cases or even arguments to the contrary and because Plaintiff has demonstrated that the conduct of the parties is a relevant inquiry in Malaysian contract law, the Court views the Terms and Conditions as fully incorporated into the Bunker Contract.

C. Does Malaysian Law Preclude the Possibility of a Maritime Lien That Arises By Contract, Even If That Lien Arises By Application of U.S. Law?

[2] Defendants argue that, even if the choice of law clause is incorporated into the Bunker Contract, a maritime lien is not available because Malaysian law does not allow a maritime lien to arise by way of agreement, only by operation of law. Malaysian law does not allow a lien for necessaries and looks to the law of the forum for any grounds for liens for which Malaysian law does not provide:

> Any addition to this list of claims attracting maritime liens [which did not include necessaries] must be brought about by the legislature and not the courts and maritime liens created under foreign law would not be recognized unless the underlying claim is one which the *lex fori* also regards as capable of attracting a maritime lien.

(Joseph Oct. 17 Decl. Ex. 39 at 58.) Since the *lex fori* is, in this case, the law of the United States (or of a California District Court sitting in admiralty), Defendants' argument really merges into Defendants' next argument: whether United States maritime law supports a lien under the circumstances of the instant case.

D. Does U.S. Law Preclude a Maritime Lien Under These Circumstances?

Defendants argue that Unites States law precludes a maritime lien under the circumstances of this case for two reasons: (1) U.S. law does not provide a maritime lien under the FMLA for goods supplied by a foreign plaintiff to a foreign vessel in foreign ports; and (2) Federal contract law would not allow the choice of law clause to stand.

Whether a Maritime Lien Is Available as a Matter of United States Law. Defendants argue that a maritime lien is not available to Plaintiff under the facts of this case because the Federal Maritime Liability Act ("FMLA"), 46 U.S.C. § 30101 *et seq.*, does not provide for a maritime lien for necessaries when the supplier of the necessaries is foreign, the Vessel is flagged under a foreign country, and the necessaries are provided in a foreign port. Here, Plaintiff, the supplier, is a Singapore corporation;[7] the Vessel is

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[7] In the original filings on choice of law, Trans-Tec contended that it should be treated as a United States corporation since it is ultimately owned by World Fuel Services ("WFS"), a Miami-based company. Trans-Tec, however, identified itself in its Complaint as "a division of a corporation organized and existing by virtue of and under the laws of Singapore. . . ." (Complaint ¶ 4.) This is a binding judicial admission. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them."). In this round of briefing, Trans-Tec does not argue that it should be considered a U.S. company and Trans-Tec has not amended its pleadings.

flagged as Malaysian; and the bunkers were supplied in Korea. Additionally, the entire contract was negotiated in Asia.

[3] The statute conferring a maritime lien for necessaries does not specify that any of the parties to the lien must be connected to the United States, but statutes are presumed to lack an extraterritorial extension in the absence of explicit language to the contrary. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004) ("This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."); *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' . . . We assume that Congress legislates against the backdrop of the presumption against extraterritoriality." (internal citations omitted)). The statute states: "[A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner – (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel." 46 U.S.C. § 31342(a). No evidence has been presented to rebut the presumption that U.S. laws are not intended to apply extraterritorially. Maritime law is an

especially sensitive area of extraterritorial application of laws. As then-Judge Kennedy remarked in a Ninth Circuit maritime case, a myopic choice of law approach in maritime cases, looking only to the place of supply (rather than at other contacts as well),

> would run counter to an important principle, which is the desirability, even the necessity, of accommodating the legitimate interests of separate sovereignties in vindicating their own legal policies. This principle is of special import in admiralty, where international relations are delicate.

Gulf Trading & Transportation Co. v. M/V Tento, 694 F.2d 1191, 1194 (9th Cir. 1982).

In accord with this presumption against the extraterritorial application of U.S. law, numerous authorities have deemed the FMLA not to extend to transactions in which all the players and points of contact are foreign. The Eleventh Circuit has concluded that the FMLA "does not provide for a maritime lien for goods and services supplied by a foreign plaintiff to foreign flag vessels in foreign ports." *Trinidad Foundry and Fabricating, Ltd. v. M/V K.A.S. Camilla,* 966 F.2d 613, 617 (11th Cir. 1992). *Trinidad Foundry*'s facts are different than the facts in this case, but not in a material way – while in *Trinidad Foundry* the parties had chosen English law to govern disputes and English law does not allow for a maritime lien, the court's declaration regarding FMLA coverage was a *separate* basis for not recognizing a maritime lien, totally unrelated to the other

basis for denying a maritime lien (that English law, the law chosen by the parties, did not recognize a maritime lien). Leading treatises on maritime law concur in the Eleventh Circuit's analysis. For example, *Benedict On Admiralty* states that "[i]t should be noted that there is no maritime lien under the Maritime Lien Act, 46 U.S.C. § 31342, for a foreign supplier of goods and services to a foreign flag vessel in a foreign port." 2 *Benedict on Admiralty* § 38, at 3-35 (7th ed. revised 1997); *see also* 1 Admiralty & Mar. Law § 9-8 (4th ed.) (Thomas J. Schoenbaum ed.) ("In cases where services or supplies are rendered by foreign companies in foreign ports, the [FMLA] is generally inapplicable. The purpose of the FMLA is to protect American, not foreign, suppliers."). The *Trinidad Foundry* court cited two cases in support of its interpretation of the FMLA, *Tramp Oil and Marine, Ltd. v. M/V Mermaid I,* 805 F.2d 42 (1st Cir. 1986), and *Swedish Telecom Radio v. M/V Discovery I,* 712 F.Supp. 1542 (S.D. Fla. 1989). In *Tramp Oil,* the First Circuit stated that "[t]he primary concern of the Federal Maritime Lien Act is the protection of American suppliers of goods and services." 805 F.2d at 46. The First Circuit punctuated its refusal to extend a maritime lien on the *Tramp Oil* facts[8] by commenting

[8] The *Tramp Oil* facts were different than those in the case at hand. In *Tramp Oil,* a fuel broker (as opposed to fuel supplier) was attempting to put a lien on a ship because the broker had not been paid. The vessel, however, had already paid the provider of the bunkers. The bunkers were provided in a Georgia

(Continued on following page)

that "[t]he maritime lien is a special privilege, 'operating to the prejudice of general creditors and purchasers without notice,' and its open-ended extension could radically change the presuppositions of maritime commerce." *Id.* (internal citations omitted). The *Trinidad Foundry* court presumably relied on the First Circuit's finding that the FMLA was designed to protect American suppliers and that the maritime lien is a powerful remedy, not one to be applied lightly, and thus concluded that the FMLA was not designed to cover factual scenarios so divorced from the United States' territory. The *Swedish Telecom* court relied on *Tramp Oil*'s statement regarding the purpose of the FMLA and also commented that the result did not "disserve[ ] the international system" given that most other countries' laws would not support a maritime lien under these circumstances (provision of necessaries). 712 F.Supp. at 1545-46.

[4] None of the cases cited by Plaintiff debunk Defendants' argument that the FMLA is not properly applied to a foreign vessel and supplier where the provisions were made in a foreign port. *Liverpool and London Steamship Protection and Indemnity Association Limited v. Queen of Leman MV,* 296 F.3d 350 (5th Cir. 2002), only dealt with whether United States or English law should apply, given the contract language. The court specifically limited its findings to

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port. *Tramp Oil and Marine, Ltd. v. M/V Mermaid I,* 805 F.2d 42 (1st Cir. 1986).

the choice of law determination, which had been certified for interlocutory appeal. *Id.* at 355 n. 5. Thus, the *Liverpool* court did not address the availability of a lien under United States law (in fact, the court wrote, "we therefore concluded that in this case the P & I rules call for the application of United States substantive law *to determine the existence of maritime liens.*" *Id.* at 355 (emphasis added).)

Gulf Trading & Transportation Co. v. Vessel Hoegh Shield, 658 F.2d 363 (5th Cir. 1981), involved the provision of bunkers within the United States' jurisdiction by an American corporation – obviously materially different facts than those in the instant case. Additionally, the *Gulf Trading* court pointed out that the congressional intent behind the FMLA was "that an American supplier of goods, services or necessaries to a foreign vessel obtains a maritime lien in the vessel when the good or services are supplied or performed in the United States," *id.* at 367, a conclusion which buttresses rather than debunks Defendants' arguments.[9]

In *Conti-Lines, S.A. v. M/V Baroness V,* 1992 AMC 681, 1991 WL 340173 (Mid. Dist. Fla. 1991), a magistrate judge rejected the conclusion in *Swedish Telecom* that a non-U.S. citizen could not assert a

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[9] The *Gulf Trading* court discussed 46 U.S.C. § 971 rather than 46 U.S.C. § 31342; however, the latter statute is an amendment of the former and was not meant to change the substantive meaning of the former statute. 2 *Benedict on Admiralty* § 35, at 3-18 (7th ed. revised 1997).

maritime lien under the FMLA. *Id.* at 683, 1991 WL 340173. In *Conti-Lines,* the repairs had been performed in New Orleans, *id.* at 682, 1991 WL 340173, so the transaction was connected with the United States. Most importantly, though, *Conti-Lines* was decided *before* the Eleventh Circuit decided *Trinidad Foundry.*

[5] No evidence has been presented to rebut the presumption against a congressional intent for a Unites States law to apply extraterritorially. *See Empagran,* 542 U.S. at 164, 124 S.Ct. 2359; *Aramco,* 499 U.S. at 248, 111 S.Ct. 1227. Particularly in the maritime context, where players from so many countries are involved – and even more particularly in the maritime lien context, where few (if any) countries allow a maritime lien for necessaries – it makes sense that the United States have some interest in the transaction before the maritime lien remedy can be properly asserted. The Eleventh Circuit persuasively reads the FMLA as not providing a maritime lien in the circumstances of this case and, in the absence of any persuasive reasoning or case citations by the Plaintiff, the Court finds that a maritime lien is not available to Plaintiff as a matter of United States law.[10]

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[10] The Bunker Contract specifically mentioned that a maritime lien was included in its choice of United States law; however, this is irrelevant because maritime liens may not arise by contract, but only by operation of law. *See Rainbow Line, Inc. v. M/V Tequila,* 480 F.2d 1024, 1026 (2d Cir. 1973).

Federal Contract Law. Because the Court has found that United States law does not support a maritime lien under the facts of this case, it is unnecessary for this Court to undertake an analysis of whether federal contract law would support the imposition of the choice of law clause and the attendant maritime lien.

E. The "Standard Terms and Conditions" Sheet

Defendants argue that (1) Plaintiff has not submitted uncontroverted evidence that the Terms and Conditions supplied to the Court, in a document entitled "The Trans-Tec Services Group of Companies General Terms and Conditions" which contains the choice of law clause on which this round of briefing is based, are *Plaintiff's* Terms and Conditions; and (2) Plaintiff has not submitted uncontroverted evidence that Kien Hung was ever supplied the Terms and Conditions referenced by the Bunker Confirmation. The Court is unconvinced by Defendants' attempt to raise factual disputes. Because United States law does not support a maritime lien under the facts of this case, however, it is unnecessary for the Court to detail Defendants' arguments and the Court's skepticism.

IV. CONCLUSION

The Court finds that Malaysian law governs the analysis of whether the choice of law clause is part of the Bunker Contract and that under Malaysian law

the choice of law clause is part of the Bunker Contract. However, the Court also finds that United States law, the chosen law, does not support a maritime lien for necessaries under the facts of this case. Accordingly, the Court GRANTS summary judgment for Defendants.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRANS-TEC ASIA, Plaintiff, v. M/V HARMONY CONTAINER Its freights, engines, apparel, and tackle, Defendant *in rem* Splendid Shipping Sendirian Berhard, Defendant, and The Master of the M/V HARMONY CONTAINER, Garnishee.	CV 04-1160 SVW (MANx) ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [62], GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [58], AND GRANTING PLAINTIFF'S REQUEST FOR RECONSIDERATION (Filed Oct. 19, 2005)

I. INTRODUCTION

This admiralty case arises out of a dispute over unpaid bunkers (fuel). Plaintiff Trans-Tec Asia ("Trans-Tec" or "Plaintiff") sold bunkers to Kien Hung Shipping Company Ltd. ("Kien Hung"), the charterer of the M/V Harmony Container ("Vessel"). Kien Hung later went bankrupt. Its bunkers contract still unpaid, Trans-Tec filed this action against the Vessel and its Owner, Defendant Splendid Shipping Sendirian Berhard ("Splendid" or "Defendant").

In its Order of August 15, 2005 ("Prior Order"), the Court determined that Malaysian law applied to the dispute.

In its motion for summary judgment, Trans-Tec asserts that (1) Splendid was unjustly enriched by Trans-Tec's provision of bunkers to Kien Hung; (2) because Splendid was unjustly enriched by Trans-Tec, Trans-Tec has the right to arrest the Vessel *in rem* on a statutory lien; and (3) Malaysian law should dictate the interpretation of the contract between Trans-Tec and Kien Hung, which would give Trans-Tec the right to arrest the Vessel *in rem* on a maritime lien.[1]

The Court DENIES Trans-Tec's motion for summary judgment on the issue of unjust enrichment.

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[1] Defendants, apparently fearing that Plaintiff would raise causes of action which Plaintiffs did not raise, defended against a number of causes of action separate from those listed. Because Plaintiff did not argue for liability under theories other than those listed, Defendants' arguments which are inapplicable to the arguments Plaintiff actually made are disregarded.

Also, Plaintiff spends considerable time in its brief complaining about the behavior of Defendants' counsel during deposition – for example, making unnecessary objections and coaching deponents through statements embedded in the objections. However, Plaintiff does not make any motion regarding these depositions.

Additionally, Defendants made a number of evidentiary objections, which may be well taken. The Court need not rule on them, however, because the disposition of the unjust enrichment claim is essentially on the law, not the facts. Therefore, the evidence to which the objections are addressed is irrelevant to the disposition of the case.

The Court GRANTS Splendid's motion for summary judgment on the issue of unjust enrichment.

The Court GRANTS Trans-Tec's invitation to reconsider its ruling in the Prior Order regarding the law to be used for determining the terms of the bunker contract between Kien Hung and Trans-Tec. In connection with the motion to reconsider, the Court ORDERS further briefing.

II. FACTS

In July 2000, Splendid entered into a New York Produce Exchange charter party contract (in standard form, known as "NYPE Time Charter") with Kien Hung for a ten-year charter of the Vessel (the "Charter Agreement"). Among other things, the Charter Agreement provided that (1) the charterers were to "provide and pay for all the fuel except as otherwise agreed" and (2) the charterers "would not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners of the vessel." (Abishegam Decl. ¶ 7, Ex. G, ¶¶ 2, 18.)

In February 2003, Trans-Tec agreed to supply Kien Hung with bunkers for the Vessel (the "Bunker Contract"). Trans-Tec and Kien Hung had done business together on many other occasions. Trans-Tec was aware that Kien Hung was in financial straits: to limit its exposure to Kien Hung, Trans-Tec had a special chain of command in charge of responding to orders by Kien Hung. At the time the order for the

Vessel was placed, Kien Hung had outstanding debts to Trans-Tec. In July 2002, Trans-Tec had entered into a guarantee with Powick Marine (Singapore) Pte. Ltd. ("Powick") (the "Guarantee"). (Ex. G to Pl. Ex. B.) The Guarantee was limited to US $5 million and governed by Singapore law. (Heijmen Aff. ¶ 9, Ex. G.)

Kien Hung last paid Splendid its charter fee in January 2003. Thus, at the time that Trans-Tec agreed to supply bunkers to Kien Hung, Kien Hung was in arrears to Splendid.

Around March 2003, Kien Hung assigned its rights and obligations under the Charter Agreement to Hamburg Sud (the "Assignment"). Splendid signed the Assignment. In May 2003, Kien Hung docked at Hong Kong and officially turned the Vessel over to Hamburg Sud.

Kien Hung subsequently went bankrupt, and Trans-Tec was never paid.

III. DISCUSSION

A. Summary Judgment

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tarin v. County of Los Angeles,* 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). That burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *See id.* at 323-34; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v. Fred Meyer,* 198 F.3d 1130, 1134 (9th Cir. 2000).

Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248; *see also Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 919 (9th Cir. 2001), (the nonmoving party must offer specific evidence from which a reasonable jury could return a verdict in its favor).

B. Unjust Enrichment

Both parties agree that under Malaysian law unjust enrichment is governed by Section 71 of the

Malaysian Contracts Act ("Section 71"). Both parties also agree that Section 71 is derived from Indian law, which has a very similar provision. (Pl. Ex. J ¶ 23.) Additionally, both parties rely heavily on Indian law for their arguments. Section 71 describes unjust enrichment:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Malaysian Contracts Act § 71. Thus, the unjust enrichment claim can be broken down into four elements: that the thing done (in this case, delivering bunkers to Kien Hung) was (1) lawful; (2) done for another person; (3) not intended to be gratuitous; and (4) the person for whom the thing was done enjoys the benefit of it. While the Court views elements one and two as arguably unmet, because Trans-Tec does not meet the most basic aspect of the unjust enrichment claim – that Splendid adequately benefitted from the bunkers to be unjustly enriched – the Court's analysis focuses on element four.[2]

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[2] Neither party disputes that Trans-Tec did not intend to provide the bunkers to Kien Hung gratuitously.

Though not clearly stated in the Malaysian cases, it can be inferred that Trans-Tec, as Plaintiff, has the burden of proof on all of these elements.

1. Element Four: Did Splendid Benefit From the Bunkers?

Splendid almost certainly did benefit from the bunkers – the question is whether Splendid benefitted in a way that is actionable under Section 71. Trans-Tec alleges that Splendid benefitted from the bunkers in four ways: (1) by allowing Kien Hung to continue operating the Vessel, the bunkers made it more likely that Kien Hung would pay the charter hire it owed to Splendid;[3] (2) if the Vessel had failed to deliver cargo because it had stopped, cargo owners would have had the right to arrest the Vessel for non-delivery of cargo; (3) by allowing Splendid to more easily assign the Charter Agreement from Kien Hung to Hamburg Sud; (4) by creating an off-set to the charter hire owed to Splendid by Kien Hung; and (5) by allowing Splendid's 60% shareholder, Halim Mazmin, to buy out Splendid's 40% shareholder at a reduced price.

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[3] Relatedly, Trans-Tec alleges that Splendid enjoyed a lien on the cargo and that the bunkers allowed Kien Hung to continue operating and therefore to take on more cargo. Because the cargo lien would be more valuable the more cargo was on the Vessel, Trans-Tec identifies a benefit to Splendid as lien-holder. This theory represents another angle of the argument that Splendid benefitted because Kien Hung was a more valuable charterer in operation than not. Splendid never enforced any lien it had against the cargo.

Splendid argues that any benefit it received was indirect and that an indirect benefit is insufficient for liability under Section 71.[4] According to *S.I. Railway Co. v. Madura Municipality*,[5] (Joseph Decl. ¶ 52, Ex. 25),

> While the railway company recognises [that the object of the work was to benefit the owners of houses and buildings] it is said that indirectly the municipality receives a benefit because it recovers taxes from the owners or occupiers of the property. This is a very indirect benefit, and S. 70 [Malaysian § 71] can in our opinion only have application where there is direct benefit to the person for whom the work is done.

(*Id.*) Trans-Tec's expert indicates that Malaysian courts have not had the opportunity to rule on whether the benefit must be direct. (Pl. Opp. Ex. P ¶ 20.) An examination of the unjust enrichment cases cited by Trans-Tec reveals that in each case the benefit was direct. Based on the direct benefit in these cases; Indian precedent (which, while not binding, is persuasive in Malaysian courts); and this Court's sense of equity, the Court determines that a direct benefit is required for a successful unjust enrichment claim.

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[4] Splendid also argues that it received no benefit. That is obviously false and the Court does not address that argument.

[5] A.I.R. 1945 Mad. 427.

Jone Theseira v. Eileen Tan Ee Lian & Anor[6] involved a mother and her sick daughter who later died. (Pl. Ex. J ¶ 43, Ex. J.) Plaintiffs had offered to pay the daughter's medical bills so that the daughter could receive treatment without the mother undergoing unnecessary financial strain, the understanding being that the mother would repay the plaintiffs after receiving insurance proceeds. The court made clear that the mother was considered responsible for the daughter's medical expenses – thus, the mother was the direct beneficiary of the payment of those medical bills. This case does not dispute that a direct benefit must be present in an unjust enrichment claim.

Another case involved real estate development. In *Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor,*[7] one developer contracted with plaintiffs to complete a housing development. (Pl. Ex. J ¶ 44, Ex. K.) The first developer failed to complete the housing development. (*Id.*) The second developer, found by the court to be in partnership with the first developer, completed the housing development but at superior specifications than those to which the initial parties had agreed; the second developer therefore asked for a higher price than had been agreed upon. (*Id.*) The court concluded that plaintiffs had benefitted from the higher quality work and found unjust enrichment. (*Id.*) In this case, the contemplated beneficiary

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[6] [2002] 4 MLJ 629.

[7] [1992] 1 MLJ 166.

(plaintiffs) never changed. At all times the benefit to the plaintiffs was the ability to profit from sales of houses in the housing development. The change in benefit was merely a change in the magnitude of the expected sales price. The fact that the benefactor changed does not affect the direct benefit requirement.

Additionally, Trans-Tec often refers to *Secretary of State and another v. G.T. Sarin and Co.*,[8] pointing out that in that case an *ultra vires* contract made by a military officer for grain was enforced against the government in unjust enrichment. (Pl. Ex. J ¶ 34, Ex. I.) While the contract was considered to be *ultra vires*, the contract was expected to directly benefit the government and the order was placed on behalf of the government. Therefore, the government was, and at all times was intended to be, the direct beneficiary of the grain. This case does not dispute the direct benefit requirement.

While Malaysian courts may not have had an opportunity to squarely rule on whether the benefit under unjust enrichment must be direct, all of the cases cited by Trans-Tec involve direct beneficiaries. Indian law has apparently adopted that requirement, and the Court views the direct benefit requirement as the most sensible approach to an equitable, quasi-contract remedy. Thus, Trans-Tec can only succeed by showing that Splendid directly benefitted from

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[8] A.I.R. 1930 Lahore 364.

Trans-Tec's provision of bunkers to the Kien Hung. Because Trans-Tec fails to meet this burden, its unjust enrichment claim also fails.

First, Trans-Tec alleges that the bunkers allowed Kien Hung to continue operating the Vessel, which allowed Kien Hung to continue doing business and therefore made it more likely that Kien Hung would pay Splendid the money it owed. However, this extremely indirect and illusory benefit cannot support an unjust enrichment claim. Under this theory, Splendid's benefit was the same as that of the person who was able to ship or receive his freight because Kien Hung continued operating. Additionally, Splendid did not receive any payments from Kien Hung after the bunker delivery from Trans-Tec. This benefit is insufficient.

Second, Trans-Tec alleges that if the Vessel had failed to deliver cargo because it stopped, cargo owners would have had the right to arrest the Vessel for non-delivery of cargo. Trans-Tec relies on the deposition testimony of one of its employees, Johannes Heijmen. Heijmen asserts that if "a charter of a vessel involved in a liner operation is stopped overnight, the vessel will be arrested by the cargo interests. The owner has to offload the cargo, reposition the ship, try to [sic] another charterer. So I think from that perspective, there's certainly interest in the owner's side, that operations and charters continue." (Ex. G at 120.) Heijmen further stated that Kien Hung's ability to keep operating benefitted Splendid because Splendid "avoid[ed] all the cost attached to,

say, a termination or let's say an unscheduled termination of the charter with all the cargo interests involved. . . ."[9] (*Id.* at 121-22.) Even assuming that Heijmen correctly states that cargo interests could have arrested the Vessel had the Vessel run out of fuel,[10] it is pure speculation that arrest actually would have happened. Furthermore, no evidence indicates that Splendid in any way controlled the bunker transaction or made decisions for Kien Hung

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[9] A maritime arrest is "the taking of a ship and sometimes its cargo into custody by virtue of a ship's warrant." *Black's Law Dictionary* 117 (Bryan A. Garner ed., 8th ed. 1999). As further explained in a treatise on maritime law,

> Maritime arrest, like maritime attachment, is a powerful procedural tool in the hands of the plaintiff. The action *in rem* allows the arrest of the vessel even though the shipowner's only contact with the jurisdiction is the presence of the vessel. The plaintiff must file a complaint and an affidavit asserting the validity of the lien in the federal district court where the vessel is or will be located during the pendency of the action. The vessel may be seized, in most cases, without notice to the shipowner or to third parties. The plaintiff has a considerable tactical advantage because the shipowner must post bond to release the vessel or, alternatively, obtain the plaintiff's consent or stipulation for release.

2 Admiralty & Mar. Law § 21-3 (4th ed.) (Thomas J. Schoenbaum ed.)

[10] Splendid challenges the admissibility of this testimony by Heijmen, alleging that he does not rise to the level of an expert witness, as Trans-Tec claims. Because the Court is not relying on this evidence for its holding, the Court need not resolve the question of its admissibility.

regarding the bunkers.[11] The contract primarily benefitted Kien Hung. To the extent that Splendid was benefitted, that was a secondary and indirect benefit.

Third, Trans-Tec alleges that if the Vessel had not been in operation, the rights to the Charter Agreement (technically, Hamburg Sud acquired the "Service Trade" of Kien Hung with respect to the Vessel) could not have been assigned to Hamburg Sud. Deposition testimony by Splendid's witness supports this statement. (Ex. I at 47.) Splendid was benefitted by the assignment to Hamburg Sud of the Charter Agreement because Kien Hung was unable to make the required payments, whereas Hamburg Sud presumably was able to do so. Again, however, this was not a benefit to the parties to the Bunker Contract (Trans-Tec and Kien Hung). The assignment was between Kien Hung and Hamburg Sud. This is essentially the same argument as that advanced

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[11] Trans-Tec's reliance on *Gulf Oil Trading Co. v. Creole Supply*, 596 F.2d 515 (2d Cir. 1979) in [sic] misplaced. First of all, *Gulf Oil* was decided under United States law, not Malaysian law. But even assuming that *Gulf Oil* is persuasive precedent for this case, the facts were entirely different: in *Gulf Oil*, Chase controlled the vessel and made a conscious decision, based on lien priority, to take on bunkers in order to remove the vessel from United States waters. Here, Trans-Tec has not submitted evidence regarding volition or control on Splendid's part. To the extent that Trans-Tec relies on the stamp of the Master Engineer on the bunkers receipt, the Court is unpersuaded. The Master Engineer took his orders from Kien Hung and was not controlled by Splendid. (*See* Abishegam Decl. Ex. G ¶¶ 8-9.)

regarding the first benefit, and likewise the answer is the same: yes, Splendid was benefitted, but not directly.

Fourth, Trans-Tec points to Kien Hung's failure to invoice Splendid for the value of the remaining bunkers as evidence that the value of bunkers constituted an off-set to the charter hire owed to Splendid by Kien Hung. The Charter Agreement provided that upon *redelivery* of the Vessel to Splendid, Splendid would reimburse Kien Hung for the remaining bunkers. (Abishegam Decl. Ex. G ¶ 40.) As a factual matter, it appears undisputed that the bunkers provided by Trans-Tec were used up before Kien Hung transferred control of the Vessel. As a legal matter, this argument also fails (whether or not Trans-Tec's bunkers were on board the Vessel when Kien Hung ceded control of it). Kien Hung did not *redeliver* the Vessel to Splendid, the event that would have triggered Splendid's responsibility to pay Kien Hung for any remaining bunkers. Rather, Kien Hung assigned its rights and obligations under the Charter Agreement to Hamburg Sud.[12] (*See* Pl. Ex. H at 113-14.) Under the Charter Agreement, Kien Hung, as

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[12] Specifically, the Assignment says that "Hamburg-Sud shall be bound by the terms and conditions of the Charterparties in every way as if Hamburg-Sud were named therein as the Charterers under each of the Charterparties in place of Kien Hung" and "Hamburg-Sud shall be entitled in place of Kien Hung to the benefits and will be entitled to exercise all rights, options, elections and remedies of Kien Hung under each of the Charterparties." (Pl. Ex. H at 113-14.)

charterer, had property ownership of the bunkers during the time charter, while Splendid had possession as a bailee.[13] (*See* Ashby Decl. ¶ 9, Ex. 4A.) Therefore, Kien Hung had rights to the bunkers and those ownership rights would have been transferred to Hamburg Sud under the Assignment. Thus, the benefit of any remaining bunkers flowed to Hamburg Sud. Splendid would have had no occasion to reimburse Kien Hung for the bunkers under the Charter Agreement. As a result, Trans-Tec's argument that the failure to reimburse Kien Hung amounts to an offset of the debt owed Splendid by Kien Hung simply does not hold water.

Fifth, Trans-Tec points to a Splendid stock purchase and attendant debt write-off. At the time that Trans-Tec delivered the bunkers to Kien Hung, Splendid had two shareholders: Halim Mazmin owned 60% of Splendid and Powick owned 40% of Splendid. In March 2003, a month after the bunkers were supplied by Trans-Tec, Halim Mazmin bought all of Powick's shares of Splendid, allegedly at a

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[13] Trans-Tec objects that the bailor-bailee relationship is based on an interpretation of the NYPE Time Charter's paragraphs two and three, but paragraph three in this Charter Agreement is marked through. While this is true, paragraph three appears in substantially the same form in the addendum paragraph forty of the Charter Agreement. Thus, reading together paragraphs two and forty of this Charter Agreement yields precisely the same result as reading together paragraphs two and three of the standard NYPE Time Charter: Kien Hung, as charterer, had property ownership of the bunkers.

reduced price (though this is disputed). Additionally, some amount of the Kien Hung debt to Splendid was forgiven as part of that transaction. Trans-Tec has failed to advance a theory satisfying the Court that this stock transaction is directly tied up with the bunkers provided by Trans-Tec.

2. *Propriety of Unjust Enrichment Claim in Face of Contract Claim*

Splendid relies on English law, particularly *Pan Ocean Shipping Co. Ltd. v. Creditcorp LTD.*,[14] which is persuasive for Malaysian law,[15] for the proposition that unjust enrichment should not be used in a situation in which a contract exists, as that would redistribute risks for which parties had already contracted. (Joseph Decl. ¶ 61, Ex. 26.) In this case, the Bunker Contract existed between Trans-Tec and Kien Hung, and Trans-Tec had also negotiated a Guarantee from Powick for bunkers supplied to Kien Hung.[16] At oral argument, Trans-Tec responded that because the Bunker Contract was between Trans-Tec and Kien Hung, not Trans-Tec and Splendid, the Bunker Contract did not preclude a quasi-contract remedy against Splendid. This argument is unsupported by the English precedent and does not comport

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[14] (1994) W.L.R. 161.

[15] Trans-Tec's expert agrees. (Pl. Ex. J ¶ 12.)

[16] Trans-Tec is proceeding against Powick on the Guarantee in Singapore.

with the Court's understanding of the relationship between contract and equitable remedies. *Pan Ocean Shipping*, like this case, involved two parties to a contract and a third party, against which one party to the contract proceeded on an unjust enrichment claim. (*Id.*) The court found that because the plaintiff had a contract claim against the party with whom it had contracted, and therefore did not have an unjust enrichment claim against that party, the plaintiff could not bring an unjust enrichment claim against the defendant, a third party. (*Id.*) Likewise, the Court finds that Trans-Tec may not proceed against Splendid in unjust enrichment when it could proceed against Kien Hung in contract.

3. Statutory Lien and Rule B Attachment

The availability of the statutory lien and Rule B attachment is dependent on the success of the unjust enrichment claim. Because the Court finds that the unjust enrichment claim fails, the Court need not address the statutory lien or Rule B attachment arguments.

C. Request for Reconsideration: Maritime Lien

When Trans-Tec and Kien Hung entered into the Bunker Contract, the confirmation from Trans-Tec to Kien Hung stated:

> This confirmation incorporates seller's standard terms and conditions dated January 3, 2000. Pls inform us if you require a copy.

(Ex. D to Pl. Ex. D.) One of those standard terms and conditions was a choice of law clause. In this Court's Prior Order, the Court determined that the choice of law clause was not incorporated into the agreement between Trans-Tec and Kien Hung. The Court analyzed the issue under United States law. Because the Court went on to determine that Malaysian law governed the dispute between Trans-Tec and Splendid, Trans-Tec now argues that the Court should have determined whether the choice of law clause was part of the contract based on Malaysian law. What is at stake here is the availability of a maritime lien against the Vessel, a remedy only available under United States law (the law chosen in the choice of law clause). Trans-Tec represents that if Malaysian law were applied to determine whether the choice of law provision was incorporated into the contract between Trans-Tec and Kien Hung, the outcome would be that the choice of law provision would be part of the contract. According to Trans-Tec, if the choice of law provision were part of the contract, United States law would apply and a maritime lien against the Vessel would be possible.[17]

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[17] While the Court's Prior Order specifically found that Splendid was not a party to the contract between Trans-Tec and Kien Hung and thus could not be liable under the provisions of that contract, this claim is an *in rem* action against the Vessel. Therefore, the fact that Splendid is not liable under the contract does not presumptively keep the Vessel from being affected by the contract.

In the Court's Prior Order, it applied United States federal law to the question of whether the Bunker Contract included the choice of law provision (which was among the "standard terms and conditions" referred to in communication from Trans-Tec to Kien Hung, *see supra*). Contrary to Trans-Tec's assertion in its request for the Court to reconsider its ruling, the Court did not apply United States law because that was the law referenced in the choice of law clause. Rather, the Court applied United States law because it interpreted Ninth Circuit precedent to mandate that the validity of a choice of law clause be analyzed using federal common law – in this case, federal maritime law – when construing a choice of law clause, per *The Bremen v. Zapata Off-Shore Co,* 407 U.S. 1, 12 (1991). The Court's analysis was guided by the Uniform Commercial Code Section 2-207, commonly known as a "battle of the forms" provision.

In its filings with the Court in preparation for the Court's Prior Order, Trans-Tec did not even argue the question of what law should be applied to determine whether the contract incorporated the choice of law clause; and Splendid stated in a perfunctory fashion that federal common law controlled the question. Now, Trans-Tec argues that the Court's approach was wrong-headed and that the analysis should proceed as follows: first, using federal maritime law choice of law rules, determine what law governs the Bunker Contract; then, using the law chosen by federal maritime choice of law rules,

determine whether the choice of law clause is part of the contract. Trans-Tec argues that the Ninth Circuit cases cited by the Court in its Prior order "did not involve the question of whether – as here – the contracts contained a choice of law clause; instead, the question was whether the U.S. court should apply the choice of law clause that the contracts undisputably contained." (Pl. at 22-23 n.15.)

The Court is inclined to agree with Trans-Tec that Malaysian law should be applied to the question of whether the choice of law clause is part of the Bunker Contract. As agreed at the hearing, however, the Court is not yet ruling on this question in order to allow Defendants an opportunity to further brief the issue.[18] Specifically, the Court orders further briefing on the following related questions:

1. What law should apply to determining the terms of the Bunker Contract, specifically whether the choice of law clause was a term of the Bunker Contract?

2. If Malaysian law would apply, would the choice of law clause be a term of the contract?

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[18] Plaintiff indicated it did not need to brief the Court further on this issue. Accordingly, Defendants are ordered to brief the questions and Plaintiff will have an opportunity to respond.

3. If the choice of law clause were considered part of the contract, would a maritime lien against the Vessel be available?

IV. CONCLUSION

Accordingly, the Court DENIES Trans-Tec's motion for summary judgment on the unjust enrichment issue and GRANTS Splendid's motion for summary judgment on the unjust enrichment issue. The parties are ORDERED to further brief the choice of law questions, as indicated above. Defendants are ordered to file their brief no later than Monday, November 7, 2005. Because Defendants have already filed a brief on this issue, the Court gives them leave to amend their filing in light of this Order if they so choose. Any amendment to the current filing is due no later than Monday, November 7, 2005. Plaintiff's response to Defendants' brief is due no later than Monday, November 14, 2005. A hearing on this matter will be held at 1:30 p.m. on Monday, November 28, 2005.

IT IS SO ORDERED.

DATED: 10/18/05 /s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRANS-TEC ASIA, Plaintiff, v. M/V HARMONY CONTAINER Its freights, engines, apparel, and tackle, Defendant *in rem*, Splendid Shipping Sendirian Berhard, Defendant, and The Master of the M/V HARMONY CONTAINER, Garnishee.	CV 04-1160 SVW (MANx) ORDER GRANTING THE MOTION FOR PARTIAL SUMMARY JUDGMENT BY DEFENDANT M/V HARMONY CONTAINER *IN REM* AND CLAIMANT SPLENDID SHIPPING SDN BHD AND DENYING TRANS-TEC'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT ON CHOICE OF LAW (Filed Aug. 17, 2005)

I. INTRODUCTION

This admiralty case arises out of a dispute over unpaid bunkers (fuel). Plaintiff Trans-Tec Asia ("Trans-Tec") sold bunkers to the charterer of Defendant *in rem* M/V Harmony Container ("Vessel"), the Kien Hung Shipping Company Ltd. ("Kien Hung"). Kien Hung later went bankrupt. Its bunkers still unpaid, Trans-Tec filed this action against the Vessel and its Owner, Defendant Splendid Shipping Sendirian Berhard ("Splendid") (collectively "Defendants").

Trans-Tec asserts five causes of action: (1) maritime lien claims in contract against the Vessel and freights; (2) maritime lien claims in tort against the Vessel and freights; (3) maritime claims in contract against the owner; (4) unjust enrichment claims against the owner; and (5) maritime attachment and garnishment of the Vessel and bunkers of the Vessel.[1]

Because choice of law is a threshold issue in this case, the Court encouraged the parties to file motions for partial summary judgment on the issue of choice of law. They have now done so. For the reasons set forth below, the Court GRANTS the Motion for Partial Summary Judgment by Defendant M/V Harmony Container *in rem* and Claimant Splendid Shipping SDN BHD.

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[1] Trans-Tec has decided not to pursue its tort claim (conversion) and will dismiss it.

II. FACTS[2]

This case involves six major players or entities: (1) Trans Tec, (2) the Vessel, (3) Splendid, (4) Kien Hung, (5) Halim Mazmin Berhad ("Halim Mazmin"), and (6) Powick Marine (Singapore) Pte. Ltd. ("Powick").

The Vessel is registered (or "flagged") under the laws of Malaysia. Splendid was at all relevant times the registered owner of the Vessel.

Splendid is a Malaysian private company with its principal place of business in Malaysia. At all relevant times, Halim Mazmin, a Malaysian public

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[2] Trans-Tec does not object to any of Defendants' factual assertions on evidentiary grounds. Nor does Trans-Tec controvert any of Defendants' factual assertions with contrary evidence of its own. Rather, Trans-Tec responds by (1) claiming that it is unable to dispute Defendants' factual assertions due to a need to conduct further discovery and/or (2) admitting the truth of Defendants' factual assertions while denying their relevance. Since the Court previously denied Trans-Tec's Rule 56(f) motion, the Court must now treat as uncontroverted those factual assertions which Trans-Tec is unable to dispute. Moreover, while Trans-Tec has submitted its own Statement of Uncontroverted Facts, almost all of its factual allegations are impermissible legal conclusions and/or without evidentiary support. Indeed, paragraphs 2, 3, 5, 6, 7, 8, 9, 10, 11, and 12 of Trans-Tec's Statement of Uncontroverted Facts contain no citations to the record whatsoever. "'[J]udges need not paw over the files without assistance of the parties.' The efficient management of judicial business mandates that parties submit evidence responsibly." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002) (quoting *Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999)).

company, owned 60% of Splendid, and Powick, a Singapore corporation, owned 40%.

At all relevant times, Splendid had a board of five (5) directors operating by simple majority vote. The five directors were: Captain Suresh Abishegam, Tan Sri Dato' Halim Bin Mohammad, Abd Halim Bin A Rahim, Shih Shia Loon and Shih Ming Tuan.[3]

Trans-Tec is registered as a Singapore "sole proprietorship" with its principal place of business in Singapore.[4] World Fuel Services (Singapore) Pte. Ltd., a Singapore limited private company, owns Trans-Tec. World Fuel Singapore Holding Company II Pte. Ltd. is the sole shareholder of World Fuel Services (Singapore) Pte. Ltd.[5] It is not clear what entity

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[3] Defendants claim that Halim Mazmin appointed three of the directors, including the Managing Director, while Powick appointed two. However, the evidence which Defendants cite for this proposition says nothing about how many directors were appointed by each shareholder or which director was appointed by which shareholder.

[4] Trans-Tec contends that it should be treated as a United States corporation since it is ultimately owned by World Fuel Services ("WFS"), a Miami-based company. In its complaint, however, Trans-Tec, identified itself in its Complaint as "a division of a corporation organized and existing by virtue of and under the laws of Singapore. . . ." (Complaint ¶ 4.) This is a binding judicial admission. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.").

[5] Defendants identify World Fuel Singapore Holding Company I Pte. Ltd. as World Fuel Services (Singapore) Pte.

(Continued on following page)

owns World Fuel Singapore Holding Company II Pte. Ltd.[6]

Powick has been in existence since 1994 and has paid up share capital of Singapore $49,817.842. Upon its incorporation and at all relevant times, Powick's shareholders were: Shih Wen Kuo, Shih Shia Loon, Shih Shia Shung, Shih Shia Hsiang, and Shih Ming Tuan. Its directors were: Shin Wen Kuo, Shih Ming Tuan, Shih Shia Loon, Tan Chak Chew, and Ng Ee Choo Linda.

Kien Hung is a Taiwan corporation with its principal place of business in Taiwan. Kien Hung has 334 registered shareholders. Five of those shareholders are Shih family members: Shih Wen Kuo, Shih Shia Loon, Shih Shia Shung, Shih Shia Hsiang, and Shih Ming Tuan. Collectively, the Shih family members hold 63.4% of Kien Hung's stock. The balance is held by the remaining 329 shareholders. From June 2002 to the present, Kien Hung's directors were Shih Wen Kuo, Shih Shia Loon and Chen Yin. There is no

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Ltd.'s sole shareholder. However, the certified records from the Accounting and Corporate Regulatory Authority ("ACRA") identify World Fuel Singapore Holding Company II Pte. Ltd. as the sole shareholder. (Benny Decl. ¶ 5, Ex. B.)

[6] Defendants submit evidence that the sole shareholder of World Fuel Singapore Holding Company I Pte. Ltd. is World Fuel Cayman Holding Company. However, according to the ACRA records submitted by Defendants, the owner of World Fuel Services (Singapore) Pte. Ltd. is World Fuel Singapore Holding Company II Pte. Ltd., *not* World Fuel Singapore Holding Company I Pte. Ltd. (Benny Decl. ¶ 5, Ex. B.)

evidence that Kien Hung has ever owned stock in either Splendid or Powick.

In July 2000, Splendid entered into a New York Produce Exchange charter party contract with Kien Hung for a 10 year charter of the Vessel (the "Charter Party"). Among other things, the Charter Party provided that (1) the Charterers were to "provide and pay for all the fuel except as otherwise agreed" and (2) the Charterers "would not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners of the vessel." (Abishegam Decl. ¶ 7, Ex. G, ¶¶ 2, 18.) The Charter Party further provided that "the Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment therefor for the time being in force." (Abishegam Decl. ¶ 11, Ex. G, ¶ 53.)

In or about July 2002, Powick provided a continuing written guarantee (the "Guarantee") to Trans-Tec, for and on behalf of Kien Hung, in consideration for Trans-Tec agreeing to supply bunkers to Kien Hung or vessels under charter to Kien Hung. The Guarantee was limited to U.S. $5 million and governed by Singapore law. The parties to the Guarantee agreed to submit to the jurisdiction of the Singapore courts for enforcement of the Guarantee.

On February 17, 2003, C.L. Wu ("Wu"), a manager for Kien Hung in its Taiwan office, faxed a bunker inquiry ("Bunker Inquiry") to Vivian Huang ("Huang") of Yee Foo Marine Industrial Co. Ltd. ("Yee Foo"), Trans-Tec's representative in Taiwan throughout 2002 and 2003.[7] Huang was Kien Hung's account representative at the time. The Bunker Inquiry requested a quote for bunkers to be provided to the Vessel for bunkering at Busan, South Korea on February 24, 2003. Huang faxed the Bunker Inquiry to Margaret Quek ("Quek") of Trans-Tec's Singapore office. Quek provided Huang with a bunker quote. Huang communicated the quote to Wu. In response, Wu faxed Huang a bunker order ("Bunker Order"). The Bunker Order stated: "Many thanks for your quotation on Feb/17/2003. Please arrange the follows [sic] and confirm by return." (Huang Decl. ¶ 7, Ex. C.) Huang then faxed the Bunker Order to Quek. Quek sent an email to Huang confirming the sale of 1150 metric tons of Grade 380CST RMG35 bunker fuel for the Vessel ("Bunker Confirmation"). Huang then faxed the Bunker Confirmation to Wu.

The Bunker Confirmation provided:

> This confirmation incorporates seller's standard terms and conditions dated January 3, 2000. Pls inform us if you require a copy.

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[7] Defendants characterize Yee Foo as Kien Hung's representative. However, Huang states in her declaration that Yee Foo is Trans-Tec's representative in Taiwan. (Huang Decl. ¶ 3.)

> All sales are on the credit of the vessel. Buyer is presumed to have authority to bind the vessel with a maritime lien. Disclaimer stamps placed by the vessel on the bunker receipt will have no effect and do not waive the seller's lien.
>
> Pls advise this office immediately of any errors, omissions or changes involving any of the items above.

(Ashby Decl. ¶ 4, Ex. B.)

Trans-Tec's standard terms and conditions are allegedly set forth in a document entitled "The Trans-Tec Services Group of Companies General Terms and Conditions" ("Terms and Conditions"). The Terms and Conditions state:

> Effective January 3, 2000, the following terms of sale and supply shall constitute the General Terms and Conditions ("General Terms") of the Trans-Tec Service Group of companies, headquartered at 700 S. Royal Poinciana Blvd., Miami Springs, Florida 33166 including but not limited to Trans-Tec Services, Inc.; Trans-Tec Services (UK) Ltd.; Trans-Tec International S.A.; Casa Petro S.A. and Trans-Tec Asia, a division of World Fuel Services (Singapore) Pte. Ltd. Unless otherwise agreed, the General Terms shall apply to every sale of marine petroleum products ("Products") entered into between a particular Trans-Tec Group company as seller ("Seller"), and any buyer of such Products ("Buyer").

(Ashby Decl. ¶ 6, Ex. C.) The Terms and Conditions contain a Choice of Law Clause, a Payment Clause, a Credit and Security Clause, and a Merger and Integration Clause. The Choice of Law Clause provides:

> 17. Law and Jurisdiction: Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each Transaction shall be governed by the laws of the United States and the State of Florida, without reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which the Seller takes legal action.

(Ashby Decl. ¶ 6, Ex. C, ¶ 17.) The Payment Clause provides:

> 7. Payment: . . . (b) Any individual bunker transaction not requiring cash advance shall require credit approval by Seller's Credit Department in Miami, Florida. This approval, which will occur prior to Seller's transmittal to Buyer of a confirmation, shall be construed as the binding act in a bunker transaction and it is agreed that contract formation has occurred in Florida and that bunkers have been provided in Florida within the scope of 42 USC 31326. . . .

(Ashby Decl. ¶ 6, Ex. C, ¶ 7.) The Credit and Security Clause provides:

> 8. Credit and Security: (a) Products supplied in each Transaction are sold and effect

> on the credit of the receiving vessel, as well as on the promise of the Buyer to pay thereof, and it is agreed and the Buyer warrants that the Seller will have and may assert a maritime lien against the Receiving Vessel for the amount due for the Products delivered. This maritime lien shall extend to the vessel's freight payments for that particular voyage during which the bunkers were supplied and to freights on all subsequent voyages.

(Ashby Decl. ¶ 8, Ex. C, ¶ 8.) The Merger and Integration Clause provides:

> 1. Incorporation and Merger: Each sale of Products shall be confirmed by telex, fax, or other writing from the Seller to the Buyer ("Confirmation"). The Confirmation shall incorporate the General Terms by reference so that the General Terms thereby supplement and are made part of the particular terms set forth in the Confirmation. The Confirmation and the General Terms shall together constitute a separate transaction ("Transaction"). These documents, taken together, shall constitute the full agreement. No other prior agreements or understandings, whether verbal or written, shall apply unless specifically referenced in the Confirmation. In the event of an inconsistency between the particular terms of the Confirmation and the General Terms, the Confirmation shall control for the purpose of that particular Transaction with the exception of Sections 8 and 17 below,

> which can only be modified by a mutually signed writing between Buyer and Seller.

(Ashby Decl. ¶ 6, Ex. C., ¶ 1.)

On February 28, 2003, Trans-Tec sent an invoice (the "Invoice") addressed to the "M/V Harmony Container and/or her owners/operators and Kien Hung Shipping Co. Ltd. c/o Yee Foo Marine Ind. Co. Ltd." on Trans-Tec's Singapore office letterhead that requested payment by April 10, 2003 and directed all "billing queries" to Trans-Tec's registered office in Singapore.[8] (Ashby Decl. ¶ 7, Ex. D.)

Kien Hung subsequently went bankrupt, and Trans-Tec was never paid.

Splendid contends that Trans-Tec did not negotiate the bunker supply transaction of February 17, 2003 with Splendid or the Master of the Vessel.[9] Splendid further claims that Trans-Tec did not advise, discuss, communicate or inform Splendid of the Bunker Confirmation.[10] Finally, Splendid claims that it had no knowledge of the Terms and Conditions

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[8] The Invoice also identified Trans-Tec as a "division/branch of World Fuel Services (Singapore) Pte. Ltd." (Ashby Decl. ¶ 7, Ex. D.)

[9] Trans-Tec provides no evidence to rebut this claim.

[10] Trans-Tec disputes this claim on the basis that its communications with Kien Hung and Powick should be imputed to Splendid.

or that Kien Hung allegedly agreed to the Terms and Conditions.[11]

III. DISCUSSION

A. Summary Judgment

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Tarin v. County of Los Angeles,* 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). That burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *See id.* at 323-34; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of

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[11] Trans-Tec provides no evidence to rebut this claim.

material fact." *Addisu v. Fred Meyer,* 198 F.3d 1130, 1134 (9th Cir. 2000).

Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

B. Choice of Law

A threshold issue in this case is which country's law governs the bunker agreement between Trans-Tec and Kien Hung for the bunkers supplied to the Vessel in Busan, South Korea in February 2003. Ordinarily, a federal court sitting in admiralty will enforce a valid choice-of-law clause. *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997). However, if there is no choice-of-law clause or the choice-of-law clause is invalid or unenforceable, the court will apply general maritime choice-of-law principles to determine which law applies. *Id.*

Trans-Tec contends that, based on the Choice of Law Clause, United States law applies. Splendid contends that, based on general maritime choice-of-law principles, Malaysian law applies. According to Trans-Tec, United States law applies because the Bunker Confirmation incorporated the Terms and Conditions, which in turn contained the Choice of Law Clause. Splendid argues in response that it is not bound by the Choice of Law Clause because

(1) the Choice of Law Clause did not become a valid part of the bunker contract and (2) Splendid, as a non-party, is not bound by the bunker contract in any event. Accordingly, Splendid argues that the Court must apply general maritime choice-of-law principles and that these principles favor the application of Malaysian law.

1. Contractual choice of law clause

Trans-Tec contends that the bunker contract contained a valid choice-of-law clause. Splendid does not dispute that a valid bunker contract was formed. It simply maintains that (1) the Choice of Law Clause did not become part of the bunker contract and, even if it did, (2) Splendid was not a party to the bunker contract and is therefore not bound by it.

"[W]here the parties specify in their contractual agreement which law will apply, admiralty courts will generally give effect to that choice." *Chan,* 123 F.3d at 1297. However, courts will decline to enforce a choice-of-law or forum-selection provision if the provision is "fundamentally unfair, or otherwise opprobrious." *Ryan-Walsh, Inc. v. M/V Ocean Trader,* 930 F. Supp. 210, 219 (D. Md. 1996); *cf. The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 12 (1991) (enforcing a forum selection clause "absent some compelling and countervailing reason").[12] In order to show that the bunker

[12] The Ninth Circuit has identified three situations in which a choice-of-clause or forum-selection clause may be repudiated:

(Continued on following page)

contract contained a valid choice-of-law clause binding on Splendid, Trans-Tec must show that (1) the Choice of Law Clause was valid and (2) Splendid was bound by the bunker contract.

a. Did the contract contain a valid choice of law clause?

United States law determines the validity of choice-of-law clauses. *See, e.g., Batchelder v. Kawamoto,* 147 F.3d 915, 918 (9th Cir. 1998); *Richards v. Lloyd's of London,* 135 F.3d 1289, 1293 (9th Cir. 1998).[13] The bunker contract was a maritime contract

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(1) if the inclusion of the clause was the result of fraud or overreaching; (2) if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and (3) if enforcement would contravene a strong public policy of the forum in which the suit is brought. *Richards v. Lloyd's of London,* 135 F.3d 1289, 1294 (9th Cir. 1998). *Accord Roby v. Corp. of Lloyd's,* 996 F.2d 1353, 1363 ([2d] Cir. 1993) (listing the same three situations but adding a fourth: if the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy). Here, Splendid is not arguing that any of these situations is present. Rather, it is arguing that, under the U.C.C., the Choice of Law Clause never became a part of the bunker contract and that, even if it did, Splendid, as a non-party, is not bound by it.

[13] The law of the chosen jurisdiction governs the scope of a valid choice-of-law clause. *See, e.g., Milanovich v. Costa Crociere, S.p.A.,* 954 F.2d 763, 767 (D.C. Cir. 1992) (explaining that if a "choice-of-law provision is valid, we will use the law that it selects to evaluate the enforceability of the remainder of the contract terms"); *Siegelman v. Cunard White Star,* 221 F.2d 189, 193 (2d Cir. 1955) (finding choice-of-law provision selecting English law enforceable, and the [sic] using English law to interpret

(Continued on following page)

for the sale of goods. "In maritime commercial transactions, the Uniform Commercial Code [UCC] is taken as indicative of the federal common law of admiralty." *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453, 1459 (9th Cir. 1989), *amended,* 918 F.2d 1476 (9th Cir. 1990). Thus, the Court must look to the UCC to determine the validity of the Choice of Law Clause.

The Bunker Confirmation provided: "This confirmation incorporates the seller's standard terms and conditions dated 3 January 2000. Pls inform us if you require a copy. . . . Pls advise this office immediately of any errors, omissions, or changes involving any of the items above." Paragraph 17 of the Terms and Conditions (i.e., the Choice of Law Clause) provided: "Each Transaction shall be governed by the laws of the United States and the State of Florida. . . ."

Trans-Tec asserts that, as a result of the Bunker Confirmation, the Choice of Law Clause became a valid part of the bunker contract. Defendants maintain that the Choice of Law Clause did not become part of the bunker contract because the Bunker Confirmation amounted to an acceptance or confirmation which contained additional terms which materially

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a provision limited the time for suit); *Jansson v. Swedish Am. Line,* 185 F.2d 212, 218 (1st Cir. 1950) (noting that "when the parties contract with the law of some particular jurisdiction in view, the law of that jurisdiction will be applicable in determining the interpretation and validity of the contract.").

altered Kien Hung's offer. Therefore, Defendants contend that the Terms and Conditions, including the Choice of Law Clause, did not become part of the contract.

UCC § 2-207 determines whether additional terms in a confirmation or acceptance become part of the contract. Thus, the Court will look to UCC § 2-207 to determine whether the Choice of Law Clause became part of the bunker contract. UCC § 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

U.C.C. § 2-207(1)-(2). The applicable California and Florida provisions are identical to their UCC counterpart. *See* Cal. Com. Code § 2207; Fla. Stat. Ann. § 672.207.

As noted above, there is no dispute here as to formation; Splendid acknowledges that a contract was formed.[14] Nor is there any dispute that Trans-Tec and Kien Hung are merchants. The only question is whether the Choice of Law Clause became part of the bunker contract. As the California Supreme Court has noted, "subsections (a), (b), and (c) of section 2207, subdivision (2), operate in the alternative. If any one of the three subsections applies, the variant terms of an acceptance do not become part of the agreement." *Steiner v. Mobil Oil Corp.*, 20 Cal.3d 90, 102 (1977); *accord Gen. Tool Indus., Inc. v. Premier Machinery, Inc.*, 790 So. 2d 449, 452 (Fla. Dist. Ct. App. 2001) (explaining that under § 672.207(2) additional terms become part of the contract unless the offer expressly limited acceptance to the terms of the offer, the acceptance materially altered the terms of

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[14] The parties agree on the chronology. On February 17, 2003, a manager with Kien Hung faxed the Bunker Inquiry to Huang. The Bunker Inquiry requested a quote for bunkers to be provided to the Vessel for bunkering at Busan, Korea on February 24, 2003. Huang then faxed the Inquiry to Quek. Quek provided Huang with a bunker quote, which Huang then communicated to Kien Hung. In response, Kien Hung faxed Huang the Bunker Order. Huang then faxed the Bunker Order to Quek, who in turn sent an email to Huang containing the Bunker Confirmation. Huang then faxed a copy of the Bunker Confirmation to Kien Hung.

the offer, or a party to the contract objects); *Advanced Mobilehome Sys. of Tampa, Inc. v. Alumax Fabricated Products, Inc.*, 666 So. 2d 166, 169 (Fla. Dist. Ct. App. 1995) ("Between merchants, such additional terms become part of the contract unless they fall within the three stated exceptions."). Thus, since Splendid does not claim that Kien Hung expressly limited Trans-Tec's acceptance to the terms of its offer or notified Trans-Tec of its objection to the Terms and Conditions within a reasonable time after notice was received, the Terms and Conditions became part of the contract unless they materially altered it.

Under the UCC, an additional term is a material alteration "if it would 'result in surprise or hardship is incorporated without express awareness or hardship by the other party.'" *Steiner*, 20 Cal. 3d at 102 (quoting U.C.C. § 2-207 cmt. 4); *accord Advanced Mobilehome*, 666 So. 2d at 169 ("The Uniform Code Comment to section 627.207(2) notes that additional terms which materially alter a contract are those that would result in surprise or hardship if incorporated without express awareness by the other party."). Examples of clauses which would normally materially alter a contract are: "'a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches . . . [or] a clause requiring that complaints be made in a time materially shorter than customary or reasonable.'" *Therma-Coustics Mfg., Inc. v. Borden, Inc.*, 167 Cal. App. 3d 282 (1985) (quoting U.C.C. § 2-207 cmt. 4.) Examples

of clauses which "'involve no unreasonable surprise and which would therefore are to be incorporated in the contract unless notice of objection is seasonably given are: . . . a clause fixing a reasonable time for complaints within customary limits.'" *Therma-Coustics*, 167 Cal. App. 3d at 296 (quoting U.C.C. § 2-207 cmt. 5.).[15]

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[15] Authorities are split over whether materiality is a question of fact or law. *Compare Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co.*, 107 Ill. App. 3d 29, 33 (1982) ("[W]e believe that defendant's provisions on prices warrant a conclusion, as a matter of law, that no unreasonable surprise occurred.") *with TRWL Fin. Establishment v. Select Int'l, Inc.*, 527 N.W.2d 573, 579 (Minn. Ct. App. 1995) ("Whether an additional term materially alters an agreement is a question of fact which must be resolved on a case by case basis."). One leading treatise notes that "the question is generally regarded as one of fact, but a number of courts have now held or intimated that certain clauses (principally those restricting rights or remedies, such as arbitration or disclaimer clauses, or those shifting risks, such as indemnity provisions) by their very nature materially alter a contract, as a matter of law." 2 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 6:22 (4th ed. 1990). *See also Dale R. Horning Co. v. Falconer Glass Indus., Inc.*, 710 F. Supp. 693, 699 n.6 (S.D. Ind. 1989) ("[E]ven though many cases state that the question of material alteration is a question of fact, there are instances in which the question is treated as one of law."); 1 E. Allen Farnsworth, *Farnsworth on Contracts* § 3.21, at 324-25 (3d ed. 2004) ("A vast amount of litigation has been devoted to determining whether particular terms result in such 'surprise or hardship' as to materially alter the contract or whether they do not, a question that courts have often treated as one of fact but sometimes as one of law."). In general, courts appear to favor the view that materiality is a question of fact. *See, e.g., Waukesha Foundry, Inc. v. Indus. Eng'g Inc.*, 91 F.3d 1002, 1008 (7th Cir. 1996) ("[T]he thrust of our prior decisions analyzing the

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While few courts have reached the question of whether a choice-of-law clause constitutes a material alteration of the terms of a contract, the few which have largely have held that a choice-of law clause *is* a material alteration. *See, e.g., Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345 (M.D.N.C.

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materiality of additional terms counsels against an across-the-board categorical approach to the materiality question. Instead, we have viewed the question of materiality as invoking an inquiry into the circumstances of the parties' relationship, expectations, and course of dealing. As with so many other aspects of contract law, the question of materiality is marked by relativity."); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 726 (8th Cir. 1977) ("[T]he better reasoned position is that the question whether an additional term constitutes a 'material alteration' is a question of fact to be resolved by the circumstances of each particular case."); *but see Mead Corp. v. McNally-Pittsburg Mfg. Corp.*, 654 F.2d 1197, 1206 (6th Cir. 1981) ("Absent the [UCC], questions of contract formation and intent remain factual issues to be resolved by the trier of fact after careful review of the evidence. However, the [UCC] provides rules of law, and section 2-207 establishes important legal principles to be employed to resolve complex contract disputes arising from the exchange of business forms. Section 2-207 was intended to provide some degree of certainty in this otherwise ambiguous area of law. In our view, it is unreasonable and contrary to the policy of the [UCC] merely to turn the issue over to the uninformed speculation of the jury left to apply its own particular sense of equity."). However, California and Florida appear to treat materiality as a question of law where the facts are undisputed. *See Frank M. Booth, Inc. v. Reynolds Metals Co.*, 754 F. Supp. 1441, 1446 (C.D. Cal. 1991) ("[T]he California courts treat application of § 2207 to undisputed facts as a matter of law."); *Gen. Tool Indus., Inc. v. Premier Mach., Inc.*, 790 So. 2d 449, 451-52 (Fla. Dist. Ct. App. 2001) (holding that resolution of a dispute over additional terms in a confirmation or acceptance may properly be resolved on summary judgment).

1995) (finding that mutually exclusive choice of law clauses constituted material alterations to the contract); *Galaxy Int'l v. White Stores, Inc.*, 88 F.R.D. 311, 321 (W.D. Pa. 1980) (holding that a choice of law clause was a material alteration where choice of law was never discussed by the parties); *Davidson Extruded Prods., Inc. v. Babcock Wire Equip., Ltd.*, 523 N.Y.S.2d 338, 341 (N.Y. Sup. Ct. 1987) (finding that a choice of law clause which provided that the contract was to be governed by the law of the seller's country was a material alteration); *but see Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F.2d 375 (5th Cir. 1981) (holding that a choice of law clause did not materially alter the terms of the contract because, as only two states had a significant relationship to the transaction, the parties must have realized that the law of one of those states would have controlled).

Likewise, courts have generally found forum-selection clauses to be material alterations. *See, e.g., M.K.C. Equip. Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 686 (D. Kan. 1994); *Product Components, Inc. v. Regency Door & Hardware, Inc.*, 568 F. Supp. 651, 655 (S.D. Ind. 1983); *Gen. Instrument Corp. v. Tie Mfg., Inc.*, 517 F. Supp. 1231, 1235 (S.D.N.Y. 1981). In *Product Components,* the court justified its conclusion on the ground that the "selection of a distant forum with which a party has no contacts, while enforceable if contained in an agreement freely and consciously entered into, can result in surprise and hardship if permitted to become effective by way of confirmation

forms that unfortunately are all too often never read." *Product Components,* 568 F. Supp. at 655.

Since it is indisputable that "[c]hoice of law is of far greater strategic important to the parties [to a contract] than a choice of forum, which in great respect is simply a matter of convenience," *Marine Oil Trading Ltd. v. Motor Tanker PAROS,* 287 F. Supp. 2d 638 645 (E.D. Va. 2003), the cases involving forum-selection clauses are instructive. Indeed, the rationale offered by the court in *Product Components* – namely, that selection of a distant forum with which a party has no contacts can result in surprise and hardship – is even more true with respect to selection of the applicable law since differences in the applicable law can have consequences far more dire than additional travel costs.

Nor does *Coastal Industries* compel a contrary conclusion. Although *Coastal Industries* would constitute strong persuasive authority in some circumstances, it can readily be distinguished from the instant case. Unlike *Coastal Industries,* which involved a transaction having significant contacts to only two jurisdictions, the bunker contract had significant contacts to a number of different jurisdictions: (1) the Vessel is Malaysian; (2) Kien Hung, the charterer, is a Taiwanese company; (3) Trans-Tec, the bunkerer, is a Singapore company; (4) the Bunker Inquiry was faxed by a manager in Kien Hung's Taiwan office to a person in Taiwan; and (5) the bunkers were scheduled for bunkering in South Korea. Under the circumstances, Kien Hung could

hardly have known that either Malaysian or United States law would apply. Thus, *Coastal Fuels* is not apposite. Indeed, the factor considered determinative by the *Coastal Fuels* court – namely, whether the parties could have anticipated that the law designated by the choice-of-law provision would have applied even in the absence of the choice-of-law provision – weighs in favor of a finding of materiality here since it is exceedingly unlikely that United States law would apply absent the Choice of Law Clause.

The only factor cited by Trans-Tec that would, if true, weigh in favor of a finding of non-materiality (or, if the issue is framed as one of fact, raise a triable issue of fact regarding materiality) is Trans-Tec's claim that Kien Hung had been put on notice of Trans-Tec's Terms and Conditions by virtue of its prior course of dealing with Trans-Tec and WFS.[16]

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[16] In his declaration, Johannes Heijmen, WFS's Vice President for Credit & Risk Management, states that Kien Hung has been a Trans-Tec customer since at least 1993 and that Kien Hung was provided with copies of the Terms and Conditions on various occasions throughout this time. (Heijmen Decl. ¶¶ 7, 11.) He further claims that WFS provided bunkers to Kien Hung vessels hundreds of times between 2000 and 2003, including 17 times to the Vessel. (Heijmen Decl. ¶ 15, Ex. H.) While he claims that each of these provisions to Kien Hung vessels was subject to the Terms and Conditions, this is an impermissible legal conclusion. (Heijmen Decl. ¶ 15.) In fact, Heijmen testifies to only one instance in which he provided Kien Hung with a copy of the Terms and Conditions. Heijmen claims that he sent an email regarding the Guarantee to W.K. Shih and Louis Chen on July

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12, 2002 in which he attached, among other things, a copy of the Guarantee and the Terms and Conditions. (Heijmen Decl. ¶ 9, Ex. E.) Assuming that the email is admissible, it establishes only that the Terms and Conditions were provided to Kien Hung on one prior occasion. The only other affiant who states that she provided Kien Hung with a copy of the Terms and Conditions is Huang. Huang states that she sent Kien Hung a copy of the Terms and Conditions sometime in 2000. (Huang Decl. ¶ 5.) Huang, however, does not state whether the Terms and Conditions were sent in relation to a specific transaction. She simply says that she sent a copy of the Terms and Conditions sometime in 2000. Thus, the two affidavits establish, at most, only that the Terms and Conditions were provided to Kien Hung *in connection with an actual transaction* on only one prior occasion. Moreover, that transaction pertained to the Guarantee, which contained a forum-selection clause providing for a Singapore forum and a choice-of-law clause making Singapore law applicable.

Citing *Gospel Missions v. City of Los Angeles*, 328 F.3d 548 (9th Cir. 2003) as precedent, Defendants argue that Trans-Tec's argument that the bunker contract was part of an ongoing course of dealing between Trans-Tec and Kien Hung should be barred as a judicial admission to the contrary. Defendants point to the fact that Trans-Tec did not characterize the bunker contract as part of an ongoing course of dealing in its Opening Brief on Dispositive Legal and Equitable Principles ("Opening Brief"). The Ninth Circuit has held that a court has the discretion to treat statements of fact contained in a brief as judicial admissions. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988). In *Gospel Missions*, the Ninth Circuit treated statements made in the plaintiffs' brief which asserted that all of the plaintiffs were in privity as binding judicial admissions. *Gospel Missions*, 328 F.3d at 557. In that case, however, the defendant relied upon the plaintiff's claim to its detriment while the plaintiff tried to benefit from its admission. *Id.* Here, there is no evidence that Trans-Tec has tried to benefit from its failure to describe the bunker contract as part of an ongoing course of dealing in its Opening Brief. Moreover, unlike the plaintiff in *Gospel Missions*, Trans-Tec did not make an

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To be sure, some courts have considered evidence of a prior course of dealing, as reflected in the repeated sending of a standard form containing the same term or condition, in determining whether an additional term constituted a material alteration. *See, e.g., Schulze & Burch Biscuit Co. v. Tree Top,* 831 F.2d 709, 716 (7th Cir. 1987) (holding that an arbitration clause was not a material alteration where the seller's agent had sent a confirmation form containing the same arbitration clause "in each of the previous nine transactions . . . between the two parties"); *Dixie Alum. Prods. v. Mitsubishi Int'l Corp.,* 785 F. Supp. 157, 160 (N.D. Ga. 1992) ("Where, as here, there are repeated opportunities for performance by either party and repeated opportunities for objection, and where no objection is made, that course of dealing is relevant to the meaning and terms of the written agreement, and bears on the issue of 'unfair surprise.' Dixie's repeated failure, over sixteen prior transactions, to object to the arbitration provision (or even to read it) does not indicate unfair surprise and therefore is not 'material.' "). However, these decisions have been widely criticized and do not represent the weight of authority. In *Trans-Aire Int'l v. N. Adhesive Co.,* 882 F.2d 1254, 1261 (7th Cir. 1989), for instance,

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affirmative representation of fact. Rather, it simply did not characterize the bunker contract as part of an ongoing course of dealing. Under the circumstances, Trans-Tec's failure to characterize the bunker contract as part of an ongoing course of dealing in its Opening Brief cannot be treated as a judicial admission.

the Seventh Circuit limited *Schulze* by holding that, since an additional term will be considered material if it causes *either* unfair surprise *or* hardship, prior notice will not render an additional term non-material if it causes hardship. In *Step-Saver Data Systems, Inc. v. Wyse Technology,* 939 F.2d 91, 104 (3d Cir. 1991), the Third Circuit went further, holding that "the repeated sending of a writing which contains certain standard terms, without any action with respect to the issues addressed by those terms, cannot constitute a course of dealing which would incorporate a term of the writing otherwise excluded under § 2-207." The court justified its holding on two grounds. First, the court noted that the repeated sending of a particular form shows only that the party sending the form *desires* certain terms. *Id.* Second, the court noted that since sellers in such situations have every opportunity to negotiate the precise terms they seek, their failure to do so strongly suggests that those terms are not part of the parties' commercial bargain. *Id.* Numerous courts have adopted the *Step-Saver* court's reasoning, although those courts have generally done so in the context of UCC § 2-207(3). *See, e.g., PCS Nitrogen Fertilizer, L.P. v. The Christy Refractories, L.L.C.,* 225 F.3d 974, 981 (8th Cir. 2000) (finding that receipt of only one customer acknowledgment form prior to the transaction at issue in the instant litigation "hardly establishes a prior course of dealing sufficient to allow Christy to unilaterally include the arbitration provision in the contract"); *In re CFLC, Inc.,* 166 F.3d 1012, 1017 (9th Cir. 1999) (finding in a case under

Article 9 of the UCC that "[c]ourse of dealing analysis is not proper in an instance where the only action taken has been the repeated delivery of a particular form by one of the parties"), *Premix-Marbletite Mfg. Corp. v. SKW Chems., Inc.*, 145 F. Supp. 2d 1348, 1356 (S.D. Fla. 2001) ("Terms and conditions contained in a form continually sent by one party do not constitute performance and cannot becoming [sic] binding as a course of dealing. The reason for this distinction between (a) the repeated manner of performance and (b) the repeated sending of a form is pragmatic. A party will certainly be cognizant of the manner in which the other side continually performs under an agreement, and if there is no objection to that performance by the first party, over a sufficient period of time, the first party is assumed to have acquiesced to the second party's manner of performance. The same cannot be said of forms continually sent from one party to another, which are often not read until a dispute arises."); *Transwestern Pipeline Co. v. Monsanto Co.*, 46 Cal. App. 4th 502, 519 (1996) ("[W]e conclude the conflicting terms and conditions on liability contained in the forms exchanged by the parties failed to establish a course of dealing and Monsanto's liability limiters did not become a part of the parties' contracts."). Although none of these cases involved UCC § 2-207(2), the rationales articulated by the *Step-Saver* court are equally compelling in the context of UCC § 2-207(2). Accordingly, the mere fact that Trans-Tec may have sent Kien Hung the Terms and Conditions on prior occasions does not constitute a course of dealing from which Kien Hung's consent

to or lack of surprise at the Terms and Conditions can be inferred.

The Court, however, need not rest its rejection of Trans-Tec's course of dealing argument on this basis alone. That is because the evidence submitted by Trans-Tec establishes, at most, that the Terms and Conditions were provided to [sic] Trans-Tec in relation to *only one prior transaction* (i.e., the Guarantee).[17]

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[17] It could be argued that the bunker contract was within the scope of the Guarantee and thus governed by it. Moreover, while Kien Hung was not a party to the Guarantee, it was a third-party beneficiary of the Guarantee, and under well-established precedent a third-party beneficiary can be bound to the terms of a forum-selection clause contained in the contract to which it is a beneficiary. *See, e.g., InterGen N.V. v. Grina,* 344 F.3d 134, 146 (1st Cir. 2003) ("[A] third-party beneficiary of a contract containing an arbitration clause can be subject to that clause and compelled to arbitrate on the demand of the signatory."); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 195 (3d Cir. 2001) ("[W]hether seeking to avoid or compel arbitration, a third party beneficiary has been bound by contract terms where its claim arises out of the underlying contract to which it was an intended third-party beneficiary."); *Hugel v. Corp. of Lloyd's,* 999 F.2d 206, 209, 210 n.7 (7th Cir. 1993) (explaining that (1) a non-party to a contract may be bound to a forum-selection clause where the party is so "closely related" to the dispute that it would be "foreseeable" that it will be bound and (2) a third-party beneficiary, by definition, satisfies these requirements); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.,* 915 F.2d 1351, 1354 (9th Cir. 1990) (enforcing a forum-selection clause against a defendant who was not a party to the contract because none of the other non-party defendants objected to the forum-selection clause); *Manetti-Farrow, Inc. v. Gucci Am., Inc.,* 858 F.2d 509, 514 n.5 (9th Cir. 1988) (holding a forum-selection clause applied to all defendants, even those who were not

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Under well-established precedent, a single prior transaction cannot constitute a course of dealing within the meaning of the UCC. *See, e.g., Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1385 (9th Cir. 1986); *Int'l Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 491 (5th Cir. 1983); *Campbell Farms v. Ward*, 578 N.W.2d 96, 100 n.2 (N.D. 1998); *Remco Equip. Sales v. Manz*, 952 S.W.2d 437, 439 (Tenn. Ct. App. 1997); *Rotuba Extruders v. Ceppos*,

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parties to the contract, because the conduct of the non-parties was so closely related to the contractual relationship); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983) ("[T]he law of contracts . . . has long recognized that third-party beneficiary status does not permit avoidance of contractual provisions otherwise enforceable."); *Nelson v. CGU Ins. Co. of* [*Canada*], 2003 WL 1856439, at *2 (D. Me. April 10, 2003) (rejecting argument that non-signatories to an insurance contract cannot be bound by the contract's forum-selection clause because "federal courts enforce forum-selection clauses equally against contract beneficiaries and signatories."); *Consol. Bathurst, Ltd. v. Rederiaktiebolaget Gustaf Erikson*, 645 F. Supp. 884, 887 (S.D. Fla. 1986) (finding that a third-party beneficiary was bound by the choice-of-forum clause in the insurance contract it invoked); *Interpool Ltd. v. Through Transport Mut. Ins. Assoc. Ltd.*, 635 F. Supp. 1503, 1505 (S.D. Fla. 1985) ("The law is clear that a third party beneficiary is bound by the terms and conditions of the contract it attempts to invoke. The beneficiary cannot accept the benefits and avoid the burdens or limitations of a contract.") (internal quotations omitted). However, in addition to a forum-selection clause, the Guarantee contained a choice-of-law clause making Singapore law applicable. Because it seeks to apply United States law, Trans-Tec has refrained from arguing that the bunker contract was governed by the terms of the Guarantee.

385 N.E.2d 1068, 1072 (N.Y. 1978).[18] Thus, Trans-Tec's course of dealing evidence, even if admissible, fails to raise a triable issue of fact regarding Kien Hung's surprise or lack thereof.[19] Accordingly, the

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[18] This is because the UCC defines a course of dealing as "as a *sequence* of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis for understanding for interpreting their expressions and other conduct." U.C.C. § 1-303(b) (emphasis added); *accord* Cal. Com. Code § 1205(1); Fla. Stat. Ann. § 671.205. Courts applying the UCC's definition of "course of dealing" have emphasized the requirement that there be a "sequence" of previous transactions. For instance, in *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1385 (9th Cir. 1986), the Ninth Circuit held that the "negotiation of a single prior contract" did not constitute a course of dealing. Numerous other courts have echoed this view. *See, e.g. Int'l Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 491 (5th Cir. 1983); *Campbell Farms v. Ward*, 578 N.W.2d 96, 100 n.2 (N.D. 1998); *Remco Equip. Sales v. Manz*, 952 S.W.2d 437, 439 (Tenn. Ct. App. 1997); *Rotuba Extruders v. Ceppos*, 385 N.E.2d 1068, 1072 (N.Y. 1978).

[19] Defendants contend that Trans-Tec's evidence of prior course of dealing is foreclosed by the very Terms and Conditions Trans-Tec seeks to invoke. As noted above, the Terms and Conditions contain a Merger and Integration Clause. It provides:

> The Confirmation and General Terms shall together constitute a separate transaction ("Transaction"). These documents, taken together, shall constitute the full agreement. No other prior agreements or understandings, whether verbal or written, shall apply unless specifically reference [sic] in the Confirmation.

Based on this language, Defendants argue that the Court may not consider any evidence outside the Terms and Conditions if it finds that the Terms and Conditions became part of the contract. Under the UCC, however, a writing may be supplemented by

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evidence of course of dealing even if the writing is a complete integration. U.C.C. § 2-202. The applicable California and Florida statutory provisions are in accord. *See* Cal. Com. Code § 2202; Fla. Stat. Ann. § 680.202. Thus, Defendants' claim that the Merger and Integration Clause would completely bar evidence of course of dealing is incorrect. Moreover, courts do not necessarily treat merger or integration clauses as conclusive of whether a writing was intended by the parties to encompass the entire agreement. Under Florida law, for instance, "[a]lthough merger or integration clauses have been considered strong evidence of finality, they are not conclusive on the issue of whether the writing encompasses the entire agreement of the parties." *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1308, 1315 (S.D. Fla. 1999). In determining whether the writing constitutes the final expression of the parties, Florida courts consider multiple factors, including evidence of trade usage, course of dealing, and course of performance. *Id.* Of these factors, course of dealing is the most important. *Id. Accord Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859 (9th Cir. 1995) (applying California law); *L.S. Heath & Son v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 569 (7th Cir. 1993) ("To be sure, the presence of a merger clause is strong evidence that the parties intended the writing to be the complete and exclusive agreement between them, but no such clause is dispositive. In order to determine whether the parties intended a writing to be the complete and exclusive agreement between them, a court must compare the writing with the prior negotiations."); *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp. Inc.*, 890 F.2d 108, 112 (9th Cir. 1989) (finding that "the presence of a merger clause while often taken as a strong sign of the parties' intent is not conclusive in all cases"); *Randle v. Glendale Nissan, Inc.*, 2005 WL 281229, at *4 (N.D. Ill. Feb. 2, 2005) ("The UCC rejects the presumption that a written contract sets forth the parties' entire agreement. Rather, to determine the intent of the parties as to integration, the court will look to a variety of factors including merger or integration clauses, disclaimer clauses, prior negotiations, any alleged extrinsic terms, and the sophisticated [sic] of the parties.") (internal quotations and citations omitted).

Court finds that the Choice of Law Clause constituted an additional term which materially altered the bunker contract. Thus, the Choice of Law Clause did not become a part of the bunker contract.

b. Are Defendants bound by the bunkering contract?

Even if the Choice of Law Clause applied, Trans-Tec would still need to establish that Splendid, a non-party to the bunker contract, was bound by the bunker contract. Trans-Tec attempts to accomplish this by means of a joint venture theory. It argues that Powick, the 40% shareholder in Splendid, was actually a shell corporation for Kien Hung and that Kien Hung operated Splendid as a joint venture with Halim Mazmin.[20] According to Trans-Tec, Splendid is

[20] The only evidence Trans-Tec cites in support of its theory are news articles and press releases in which the chief executive of Halim Mazmin referred to its partnership with Kien Hung. However, Trans-Tec did not submit these news articles and press releases in conjunction with its motion for summary judgment or its opposition to Defendants' motion. Rather, it attempts to rely on the fact that it submitted copies of them in conjunction with its Opening Brief on Dispositive Legal and Equitable Principles and its Response on Dispositive Legal and Equitable Principles. This is improper. While the Ninth Circuit has held that a verified complaint may be treated as an affidavit to the extent that the complaint is based on personal knowledge and sets forth facts admissible in evidence and to which the affiant is competent to testify, *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985), the press releases and news articles upon which Trans-Tec relies were not included in the complaint but as part of its Opening Brief and Response. Moreover, Trans-Tec did not

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therefore bound by the bunker contract because Kien Hung, in entering into the contract, acted not only as the Vessel's charterer but as its owner on behalf of Splendid. Alternatively, Trans-Tec argues that Splendid is bound by the bunker contract because the Terms and Conditions provide that the bunker sale was on the credit of the Vessel owners.[21] This argument, however, begs the question of whether Splendid can be bound by a contract to which it was not a party.[22]

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lay a foundation for the admission of these documents at the time. Rather, it simply attached them as exhibits to its Opening Brief. As it is, their admissibility is highly questionable. While newspaper articles are self-authenticating under Fed. R. Evid. 902(6), press releases are not necessarily so, although at least one court has included press releases within the matter covered by Fed. R. Evid. 902(6). *See Arachnid, Inc. v. Valley Recreation Prods., Inc.*, 2001 WL 1664052, at *4 (N.D. Ill. Dec. 27, 2001). Since the news articles and press releases are being offered for their truth, however, they must fall within a hearsay exception, which they do not appear to. Moreover, the "Offering Circular" attached as Ex. A to Trans-Tec's Response does not appear to be admissible. While the Circular appears to be a document sent by Halim Mazmin to its shareholders, it does not appear to be the type of document that is self-authenticating under Fed. R. Evid. 902(6) nor is there an affidavit authenticating it.

[21] In fact, the Credit and Security Clause provides that "[p]roducts supplied in each Transaction are sold and effect on the credit of the receiving vessel. . . ." (Ashby Decl. ¶ 8, Ex. C, ¶ 8.)

[22] Of course, since the Credit and Security Clause was part of the Terms and Conditions, the Court would need to determine whether the Credit and Security Clause materially altered the contract.

In response, Defendants argue that (1) Trans-Tec's joint venture theory fails and (2) Trans-Tec, which drafted the confirmation and the terms and conditions, cannot unilaterally bind a non-party to the contract.

i. Joint Venture Theory

"Federal courts sitting in admiralty generally apply federal common law when examining corporate identity." *Chan*, 123 F.3d at 1294. Although there appears to be no federal appellate case on point in which the elements of a joint venture under federal common law are spelled out[23], "different jurisdictions

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[23] In *Davi[d]son v. Enstar Corp.*, 848 F.2d 574, 577 (5th Cir. 1988), the Fifth Circuit held that the elements of a joint venture for purposes of the Longshore & Harbor Workers' Compensation Act ("LHWCA") were:

> (1) whether the parties intended to form a partnership or joint venture; (2) whether the parties share a common interest in the subject matter of the venture; (3) whether the parties share profits and losses from the venture; and (4) whether the parties have joint control or the right of control over the venture.

However, the court identified these elements only after having first concluded that the law of joint ventures as it existed in 1927, when the LHWCA was enacted, applied. *Id.*

In *United States v. USX Corp.*, 68 F.3d 811, 826-27 (3d Cir. 1995), the Third Circuit, applying New Jersey law, identified the following five elements as essential to the existence of a joint venture: (1) an agreement, express or implied, between the parties; (2) the contribution by each party of money, property, effort, knowledge or some other asset to a common undertaking; (3) the existence of a joint property interest in the subject matter

(Continued on following page)

generally adopt the same criteria for the establishment of a joint venture." *United States v. USX Corp.*, 68 F.3d 811, 826 n.30 (3d Cir. 1995). Accordingly, since the parties appear to agree on the applicable test, the Court will apply the elements set forth by the Second Circuit: (1) a specific agreement to carry on an enterprise for profit; (2) an intent to be joint venturers; (3) mutual contributions of financing, skill, property, knowledge, or effort; (4) some degree of joint control over the venture; and (5) a provision for the sharing of both profits and losses. *Itel Containers Int'l*

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of the venture; (4) the right of mutual control or management of the venture; and (5) an agreement to share the profits or losses of the venture.

In *Shell Oil Co. v. Prestidge*, 249 F.2d 413, 415-16 (9th Cir. 1957), the Ninth Circuit, applying common law principles, identified the following factors as essential to the existence of a joint venture: (1) a contract between the parties, (2) a common purpose, (3) a community of interest, (4) mutual control, (5) contribution by the parties of property, money, efforts, skill or knowledge to the common enterprise, and (6) agreement to share in the profits and losses.

Under the Restatement (Second) of Torts, four elements are essential to a joint venture:

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Restatement (Second) of Torts § 491 cmt. c (1965).

Corp. v. Atlanttrafik Exp. Serv. Ltd., 909 F.2d 698, 701 (2d Cir. 1990) (applying New York law).[24]

In this case, Trans-Tec has produced no evidence showing (1) mutual contributions of financing, skill, property, knowledge, or effort, (2) some degree of joint control over the venture, or (3) a provision for the sharing of profit and loss. Indeed, Trans-Tec's only evidence of a joint venture – the press releases and newspaper articles – goes solely to the remaining two elements: a specific agreement and an intent to be joint ventures. Thus, if the press releases and newspaper articles were excluded, Trans-Tec would have no evidence as to any of the elements. Even with the press releases and newspaper articles, however, Trans-Tec has failed to raise a triable issue of fact with regard to three of the elements necessary to establish a joint venture.

Moreover, even if Trans-Tec had raised a triable issue of fact regarding the existence of a joint venture, a trial would still not necessarily be in Trans-Tec's future. To prevail on its joint venture theory, Trans-Tec must do more than simply prove the existence of a joint venture. Since "[a] corporation and a

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[24] In *Bay Casino, LLC v. M/V ROYAL EMPRESS*, 1998 WL 566772, at *2 (E.D.N.Y. Aug. 21, 1998), the district court noted that the *Itel* court's requirement that the joint venturers share losses was in conflict with an earlier Second Circuit case, *Anderson v. National Producing Co.*, 253 F.2d 834 (2d Cir. 1958), which held that New York law did not require the sharing of losses in order to prove a joint venture.

joint venture are mutually exclusive ways of doing business," *id.* at 702, Trans-Tec must persuade the Court to disregard Splendid's corporate form. Further, in order to establish that Powick was a shell corporation for Kien Hung, Trans-Tec must establish that Powick had no separate corporate existence from Kien Hung.[25] Finally, even if Trans-Tec were able to prove that Splendid was a joint venture between Halim Mazmin and Kien Hung and that Powick was a shell corporation for Kien Hung, it would still need to show that the bunker agreement was within the scope of the joint venture.

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[25] The Ninth Circuit has held that admiralty courts may pierce the corporate veil in order to reach the "alter egos" of a corporate defendant. *Chan,* 123 F.3d at 1294. Generally, "'corporate separateness is respected unless doing so would work injustice upon an innocent third party.'" *Id.* (quoting *Kilkenny v. Arco Marine Inc.,* 800 F.2d 853, 859 (9th Cir. 1986)). However, federal common law allows veil piercing "where a corporation uses its alter ego to perpetrate a fraud or where it so dominates and disregards its alter ego's corporate form that the alter ego was actually carrying on the controlling corporation's business instead of its own." *Chan,* 123 F.3d at 1294. In *Chan,* the Ninth Circuit looked to Second Circuit for guidance on the law of veil piercing under federal common law. *Id.* (citing *Kirno Hill Corp. v. Holt,* 618 F.2d 982, 985 (2d Cir. 1980)). As articulated by the Second Circuit, the test for veil piercing encompasses a number of factors, including (1) the absence of corporate formalities, (2) inadequate capitalization, and (3) personal use of corporate funds. *Walter E. Heller & Co. v. Video Innovations, Inc.,* 730 F.2d 50, 53 (2d Cir. 1984). The Ninth Circuit, however, has cautioned that "[c]ommon ownership alone is insufficient to support disregard of the corporate form." *Chan,* 123 F.3d at 1294.

Trans-Tec, however, has not raised a triable issue of fact regarding either Splendid's status as a corporation or Powick's status as a separate entity from Kien Hung.[26] While Defendants have introduced evidence that Splendid was incorporated under the laws of Malaysia, Trans-Tec has introduced no evidence raising a triable issue of fact regarding the validity of Splendid's corporate status. Further, while Defendants have introduced evidence that Powick was incorporated under the laws of Singapore, that it paid up share capital of Singapore $49,817.842, and that it had its own board of directors, Trans-Tec has proffered no evidence of an absence of corporate formalities, undercapitalization, or personal use of corporate funds. Indeed, to the extent that Kien Hung was relying on a U.S. $5 million guarantee from Powick, the Guarantee gives rise to an inference that Kien Hung, not Powick, was undercapitalized. Finally, Heijmen states in his declaration that an

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[26] The mere fact that Kien Hung and Splendid may have a director (Shih Shia Loon) in common does not suffice to impute Kien Hung's actions to Splendid. *See Haas v. 653 Leasing Co.*, 425 F. Supp. 1305, 1315 (D.C. Pa. 1977) ("The mere fact that Galloway or anyone else was an officer of both corporations does not aid plaintiff. It is quite common for persons engaged in business to serve as officers or directors of more than one corporation as well as to occupy positions as officers or directors of civic organizations and religious or other nonprofit institutions. It could hardly be argued that such interlocking directorates or officerships lead to responsibility on the part of one of the organizations for liability arising out of the activities of the other.").

audited annual report of Powick which was made available to Trans-Tec at the time the Guarantee was being negotiated revealed that Powick had total equity of Singapore $75,637,329 at the end of 2001. (Heijmen Decl. ¶ 8.) This hardly constitutes evidence of undercapitalization.

ii. Binding a Non-Party to the Contract

As an alternative to its joint venture theory, Trans-Tec contends that Splendid was bound by the bunker contract by virtue of a clause in the Terms and Conditions which provided that the bunker sale was on the credit of the Vessel's owners. Defendants counter that Trans-Tec, which drafted the confirmation and the terms and conditions, cannot bind a non-party to the contract.

Defendants cite five cases in support of its claim that it cannot be bound to the bunker contract. First, Defendants cite *Rainbow Line, Inc. v. M/V TEQUILA*, 480 F.2d 1024 (2d Cir. 1973). In *TEQUILA*, the Second Circuit addressed the issue of which country's law to apply in determining the priority of various maritime liens. The case involved a breach of a charter party by the vessel's owner. *Id.* at 1025. The owner breached the charter party so that the ship could be sold to another company. *Id.* The new owner in turn defaulted on a loan secured by a mortgage on the vessel. *Id.* The issue on appeal was whether the charterer or the mortgagor had priority. *Id.* This

question, in turn, depended on whether the charterer had a maritime lien for the breach of the charter party. *Id.* If it did, it would have had priority over the mortgagor since the lien attached before the mortgagor recorded the mortgage. *Id.* at 1025-26. The mortgagor contended that British law applied because it was the law of the flag at the time of the breach; the charterer claimed that United States law applied because that is what the charterer and the owner intended. *Id.* at 1026. The court, however, held that the intent of the parties to the charter party could not operate to the disadvantage of third parties. *Id.* Therefore, it rejected the charterer's argument that the intent of the parties to the charter party should control. *Id.*

Second, Defendants cite *Gulf Trading & Transportation Co. v. M/V TENTO,* 694 F.2d 1191 (9th Cir. 1982). In *TENTO,* the Ninth Circuit also addressed the issue of which country's law to apply in regard to various maritime lines. The case involved a Norwegian vessel owned by I/S Norexim ("Norexim"). *Id.* at 1192. Norexim chartered the vessel to one company, which in turn subchartered the vessel to another company. *Id.* Norexim's charter with the first company provided that United States law would govern and that the charterer would be responsible for obtaining the vessel's fuel. *Id.* The subcharterer proceeded to refuel the vessel twice. *Id.* When neither the subcharterer nor Norexim paid for the fuel, the two fuel companies initiated an *in rem* action against the vessel. *Id.* Seeking to avoid the application of

United States law, Norexim argued, relying on *TEQUILA,* that the choice-of-law clause in the charter party was irrelevant since the fuel companies were not parties to the contract. *Id.* at 1196 n.8. The Ninth Circuit, however, distinguished *TEQUILA* on the ground that, while the charterer in *TEQUILA* was seeking to enforce a contract so as to disadvantage a non-party, Norexim was seeking to avoid enforcement of a contract *to which it was a party* so as to disadvantage a non-party. *Id.* In the process, the court described *TEQUILA* as "merely stating an obvious truism – non-parties cannot be bound by an agreement." *Id.*

Third, Defendants cite *Redcliffe Americas Ltd. v. M/V TYSON LYKES,* 806 F. Supp. 69, 71 (D.S.C. 1992), *rev'd on other grounds,* 996 F.2d 47 (4th Cir. 1993). In *TYSON LYKES,* the court addressed the issue of whether Redcliffe Americas Limited ("Redcliffe"), which leased refrigerated containers to a shipping company that transported containerized goods between locations in the United States and Europe, had maritime liens against the two vessels which the shipping company leased from their owner, First American Bulk Carrier Corporation ("FABC"). *Id.* at 70. The lease agreement between Redcliffe and the shipping company provided that New York law would apply. *Id.* at 70 n.1. The court held that the choice-of-law clause was not binding upon FABC because FABC was not a party to the lease. *Id.* at 71. The court explained that "[a] choice of law clause . . . may not operate to the prejudice of a defendant who

is not a party to the contract containing the choice of law clause." *Id.* (citing *TEQUILA*, 480 F.2d at 1026).[27]

Fourth, Defendants cite *Madredeus Shipping Co. Ltd. v. Century Bridge Chartering Co. Ltd.*, 2000 WL 1205336 (S.D. Fla. Feb. 11, 2000). In *Madredeus*, the ship's owner time chartered the vessel to a company pursuant to a six-month contract. *Id.* at *1. The charterer subsequently entered into a bunker contract with a fuel seller. *Id.* A dispute over non-payment subsequently arose, and the fuel seller had the vessel arrested. *Id.* A choice-of-law clause in the bunker contract provided that Hong Kong (British) law would govern. *Id.* at *3. Although the shipowner invoked the choice-of-law clause in order to defeat seizure of the vessel, the court held that the owner's invocation of the clause did not bind it to the contract. *Id.* at *5. In addition, the court held that the mere fact that the bunker confirmation was addressed to "Master and/or Owners and/or Managing Owners and/or Charterers and/or Operators of M/V 'Thiseas' and/or Sky-Sailing Overseas Beijing" was insufficient to bind the owner in the absence of any evidence, such as a signature or fax confirmation, that the shipowner received the contract and accepted its terms. *Id.* at *6.

Fifth, Defendants cite *Lion de Mer S.A. v. M/V LORETTA D*, 1998 WL 307077 (D. Md. April 3, 1998).

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[27] On appeal, the Fourth Circuit did not address this aspect of the district court's holding.

In *LORETTA D*, the owner of a vessel flagged flying a Liberian flag entered into a time charter with a charterer. *Id.* at *1. The charter party contained a prohibition-on-liens clause and a provision making the charterer responsible for paying for fuel. *Id.* The charterer subsequently failed to make payments on fuel which it purchased. *Id.* at *1. As a result, the fuel seller had the vessel arrested. *Id.* The vessel owner filed a motion to quash the arrest warrant on the ground that the seller did not have a valid lien. *Id.* The parties disagreed about whether Greek or Liberian law applied. *Id.* at *2. Instead of resolving the choice of law issue, however, the court simply determined whether a lien existed under either country's laws. After finding that no lien existed under Greek law, the court turned to Liberian law to determine whether the seller was entitled to a lien under Liberian law. *Id.* at *3. The court found that under Liberian law the seller of necessaries is not entitled to a lien where the seller "knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party . . . the person ordering necessaries was without authority to bind the vessel therefor." *Id.* Applying this standard,[28] the court found that the seller did not have a lien against the shipowner because there was no evidence that the

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[28] The court noted Liberian law applied "principles identical to those employed in U.S. maritime law prior to the 1971 deletion of the duty of inquiry provisions from the Liens on Vessels Act, 36 Stat. 604 Ch. 373 (June 23, 1910)." *Id.*

owner took responsibility for the bunkering contract or that the seller exercised reasonable diligence in ascertaining whether the charterer had the authority to bind the owner.

In response, Trans-Tec cites two cases in support of its contention that Splendid can be bound to the bunker contract. First, Trans-Tec cites *Ryan-Walsh, Inc. v. M/V OCEAN TRADER,* 930 F. Supp. 210 (D. Md. 1996). In *OCEAN TRADER,* the plaintiff, International Marine Fuels San Francisco, Inc. ("IMF-SF"), provided bunkers to the ANANGEL HAPPINESS, as the OCEAN TRADER was then known, in Jakarta, Indonesia on June 13, 1990 and in Singapore on June 27, 1990. *Id.* at 212. IMF-SF billed the time charterer, Meridian Shipping ("Meridian"). *Id.* Meridian subsequently filed for bankruptcy. *Id.* At the time the liens allegedly arose, the ANANGEL HAPPINESS was owned by Anangel Happiness Companania Naveria, S.A. *Id.* The ship was subsequently bought by Lutecia Navigation Co., Ltd., and renamed SEA CREST. *Id.* Later still, the ship was sold to Sea-Shore Shipping Co., Ltd., and renamed the OCEAN TRADER. *Id.* at 212-13. The owner at the time the suit was filed was Waterville Navigation, Inc. ("Waterville"). *Id.* at 213. Although Waterville argued that Indonesia or Singapore law should apply, the court held that American law applied by virtue of a choice-of-law clause in the bunker invoice making American law applicable. *Id.* at 218-19.

Second, Trans-Tec cites *Liverpool & London Steamship Prot. & Indem. Ass'n v. M/V QUEEN OF*

LEMAN, 296 F.3d 350 (5th Cir. 2002). In *QUEEN OF LEMAN*, the Liverpool and London Steamship Protection and Indemnity Association ("L & L") provided protection and indemnity ("P&I") insurance to the owners and operators of the QUEEN OF LEMAN. *Id.* at 351. Under the terms of the P&I contract, L & L had certain rights to assert liens for the collection of unpaid premiums. *Id.* L & L subsequently had the QUEEN OF LEMAN seized and sold. *Id.* Two additional parties, Tokio Marine and Fire Insurance Co. Ltd. ("Tokio") and Fuji Vegetable Oil, Inc. ("Fuji"), sought to recover from the proceeds of the sale. *Id.* To prevent L & L from recovering, Tokio and Fuji argued that the P&I contract called for the application of English law, which did not give L & L a maritime lien. *Id.* Also at issue in *QUEEN OF LEMAN* was the legality of the seizure of another ship, the KAPPA UNITY. L & L had sold P&I insurance to the owners of KAPPA UNITY. *Id.* at 352. The owners subsequently became delinquent on their premiums. *Id.* In 2000, after the owners had become delinquent, they sold the KAPPA UNITY to Interforce Shipping Ltd. ("Interforce"). *Id.* Interforce claimed to have no knowledge of the debts. *Id.* In an attempt to recover on the unpaid premiums, L & L had the vessel seized. *Id.* On appeal, the Fifth Circuit held that, under the terms of the P&I contract, the issue of whether a maritime lien existed in the first place was governed by the law of the local jurisdiction in which the vessel was seized. *Id.* at 352-54. As a result, L & L had a valid maritime lien in both the QUEEN OF LEMAN and the KAPPA UNITY. Nevertheless, Interforce

argued that, as a non-party, it was not bound by the P&I contract. *Id.* The Fifth Circuit rejected this argument, explaining that, as the maritime liens had attached prior to Interforce's purchase, the fact that Interforce was not a party to the P&I contract was irrelevant. *Id.* at 355.

Of these cases, the Court finds *TYSON LYKES* the most persuasive. Although *OCEAN TRADER* bears the closest factual resemblance to the instant case, the court in *OCEAN TRADER* provided no rationale for its conclusion that Waterville, a company which did not even own the ship at the time of the bunker sale, should be bound by the choice-of-law clause. Accordingly, the Court does not accord it much weight. Nor does the Court find *QUEEN OF LEMAN* apposite. In that case, the choice of law was dictated by the terms of the contract, terms which bear no resemblance to the terms at issue here. Moreover, the fact that Interforce was a not a party to the P&I contract was irrelevant because the liens had attached *prior* to its purchase of the vessel. Likewise, the Court does not find *LORETTA D* persuasive for the simple reason that it involved the application of Liberian law. Thus, it sheds no light on the instant dispute. Furthermore, while *TEQUILA* and *TENTO* do articulate the general principal that non-parties cannot be bound to a contract[29], they are not on all fours with the instant case. In *TEQUILA*, the

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[29] *TENTO* does so in dicta.

charterer was seeking to bind a mortgagor, not the shipowner, while in *TENTO* the shipowner was seeking to *avoid* the contract. In *TYSON LYKES,* by contrast, an entity which had leased equipment to a shipping company was seeking to bind the shipowner to the lease. This fact patterns bears a close resemblance to the instant case. Accordingly, the Court adopts the reasoning of the court in *TYSON LYKES* and finds that Splendid, as a non-party to the bunker contract, cannot be bound by its terms. Accordingly, even if the Choice of Law Clause had become a valid part of the bunker contract, it would not govern the choice of law here.

2. General Maritime Choice of Law Principles

If there is no contractual choice of law, the choice of law will be determined by general maritime choice-of law principles. *See Chan,* 123 F.3d at 1297 (holding that "federal courts sitting in admiralty apply federal maritime choice-of-law principles derived from the Supreme Court's decision in *Lauritzen* . . . and its progeny"). In *Lauritzen v. Larsen,* 345 U.S. 583, (1953), the Supreme Court identified seven factors to be considered in determining the choice of law: (a) the allegiance of the Trans-Tec, (b) the allegiance of the defendant shipowner, (c) the place of the contract, (d) the law of the flag, (e) the locality, (f) the inaccessibility of a foreign forum, and (g) the law of the forum. Although *Lauritzen* involved a tort claim, the seven-factor approach has been expanded to "guide courts in the application of maritime law generally," and is

therefore the appropriate test for the present case. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959). The Supreme Court has since clarified that this list of factors is not exhaustive, and there may be other factors to be considered. *See Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970). At that time, the Court added an eighth factor to the *Lauritzen* analysis: (h) the shipowner's base of operations. *Id.* The Ninth Circuit has interpreted the *Rhoditis* expansion of the *Lauritzen* analysis to mean that courts must look at all points of contacts between the transaction and sovereign legal systems affected by it, rather than applying the seven factors mechanically. *See TENTO*, 694 F.2d at 1195.

The factors must be weighed based on the type of claim involved. *See, e.g., Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 85 (9th Cir. 1980) ("Courts have also indicated that particular factors will merit varying degrees of consideration from cases to case. Factors that have little significance in one factual setting may warrant greater weight in another."); *Loginter S.A. v. M/V NOBILITY*, 177 F. Supp. 2d 411, 417 (D. Md. 2001). In *Lauritzen*, the Supreme Court addressed a shipboard tort, not a maritime lien; therefore, not all of the *Lauritzen* factors would apply equally to a contracts or unjust enrichment claim. *Id.* In disputes concerning maritime liens, courts should "look to the *Lauritzen* factors for guidance, but focus more attention on the citizenship of the parties, the location of the contract performance, and whether the ship is American," which are the first four factors of

the *Lauritzen* test. *Id.* Accordingly, these four factors are discussed first below.

a. Allegiance of the Plaintiff: Singapore

The allegiance of the Trans-Tec is determined by the Trans-Tec's place of incorporation. *See, e.g., Romero,* 358 U.S. at 383; *Forsythe Int'l Ltd. v. M/V RUTH VENTURE,* 633 F. Supp. 74, 76 (D. Or. 1985). Trans-Tec is incorporated in Singapore, with its principal place of business in Singapore. Furthermore, it is owned by a Singapore company. Thus, this factor points to Singaporean law.[30]

In explaining this factor, the Supreme Court reasoned that "[e]ach nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support." *Lauritzen,* 345 U.S. at 586. This statement refers specifically to plaintiffs who suffer personal injuries, but it could be extended to economically damaged plaintiffs as well. Because Trans-Tec is a Singaporean business and undeservingly bore the loss of Kien Hung's bankruptcy, Singapore has an interest in seeing Trans-Tec's debt repaid.

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[30] The fact that Trans-Tec may be ultimately owned by a US-based company does not negate the fact that Trans-Tec is registered as Singapore "sole proprietorship" with its principal place of business in Singapore.

However, Trans-Tec cites several United States contacts to show that this factor points to United States law. First, Trans-Tec argues that all sales to Kien Hung after May 2002 were authorized by WFS's main office in Miami, Florida.[31] Additionally, Trans-Tec notes that Kien Hung had previously wired several payments to Trans-Tec's Chicago bank.

These arguments are unpersuasive. While Trans-Tec's invoice required payment to a United States bank, the invoice also directed billing inquiries to the Singapore office. Moreover, the Singapore office took the order, confirmed the order via an email bearing Trans-Tec's name and Singapore address and directing Kien Hung to inform "this office" of "any errors, omissions, or changes," and sent Kien Hung an invoice on the Singapore office's letterhead. Therefore, regardless of whether money was deposited in the United States, the transaction itself was handled by Trans-Tec's Singapore office. The fact that the extension of credit to Kien Hung may have been approved in advance by WFS' main office in Miami, Florida does not alter the analysis. The key inquiry is the place of incorporation. Since Trans-Tec was

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[31] In his declaration, Heijmen states, "In particular, in February, 2003 Mr. Louis Chen and I agreed to the further extension of credit for the bunker supply of the M/V HARMONY CONTAINER, and I notified the Trans-Tec Singapore office (Trans-Tec Asia) that there could be a further provision of bunkers to the M/V Harmony container." (Heijmen Decl. ¶ 13.)

incorporated in Singapore, this factor points to Singapore law.

b. Allegiance of the Defendant: Malaysia

Similarly, the allegiance of the Defendant is determined by the defendant's place of incorporation. *See, e.g., Romero,* 358 U.S. at 383; *Forsythe,* 633 F. Supp. at 76. Defendant Splendid Shipping is a Malaysian corporation. This factor points to Malaysian law.

Courts have discounted this factor in contracts disputes where, as here, the shipowner's allegiance and the ship's registration (also called "the ship's flag") are of the same nationality. *See Loginter,* 177 F. Supp. 2d at 418. In *Loginter,* the shipowner and the ship's flag were both Maltese. *Id.* at 418. The court determined that when the shipowner's allegiance and the ship's registration are of the same nationality, this factor should be given less weight. *Id.* Relying on a quote from *Lauritzen,* the court suggested that this factor was created to discourage American shipowners from registering their ships in foreign countries for the sole purpose of obtaining more favorable shipping laws. *Id.* (citing *Lauritzen,* 345 U.S. at 587). Accordingly, the court concluded that where the shipowner's allegiance was the same as the ship's flag, this factor should be given less weight because the evasive registration that the factor seeks to uncover would not be not present. In that case, however, the court also relied on the fact that the shipowner was

not a defendant. *Loginter,* 177 F. Supp. 2d at 418. Here, of course, the shipowner is a defendant. Thus, the allegiance of the shipowner *is* relevant in a way which it was not in *Loginter.* As a result, the Court will accord this factor no less weight here.

c. Place of Contract: Singapore

The place of contract "often has significance" in determining the choice of law in contract disputes. *Lauritzen,* 345 U.S. at 588. Here, Defendants dispute that they were a party to the contract. Thus, they contend that this factor should not be given any weight. The Second Circuit has endorsed this view. In *Carbotrade S.p.A. v. Bureau Veritas,* 99 F.3d 86, 91 (2d Cir. 1996), the Second Circuit declined to consider the place of contract because no direct contractual relationship existed between the plaintiff and the defendant. Although the relationship between the plaintiff (a charterer) and defendant (a classification company which had contracted with the ship's owner to survey the ship) in *Carbotrade* was arguably more attenuated than the relationship between Trans-Tec and Splendid, the Court has already found that Splendid was not a party to the bunker contract. Thus, the principle articulated in *Carbotrade* should arguably apply here. The Court, however, declines to fully adopt the principle articulated in *Carbotrade.* Although the lack of a direct contractual relationship between the plaintiff and the defendant should factor into the equation, the Court finds that completely disregarding the place of contract factor in such cases

is unwarranted. Accordingly, the Court will not discount the place of contract factor, although it will accord it less weight here.

In this case, the place of contract factor weighs in favor of the application of Singapore law. When a contract is made over a long distance, the place of contract is typically regarded as the location of the seller's office. *See, e.g., TENTO,* 694 F.2d at 1196 (finding that the place of contract was New York where the buyer contacted the seller at its New York office); *RUTH VENTURE*, 633 F. Supp. at 75. Since Trans-Tec's Singapore office took the Bunker Order and sent the Bunker Confirmation and the Invoice, the place of contract would be Singapore.

d. Law of the Flag: Malaysia

"Under international law, each state determines the conditions on which it grants its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it." *Lauritzen,* 345 U.S. at 584. This principle is embodied in the law of the flag factor, in which the ship's nationality, determined by the ship's papers and flag, indicates what law should be applied. *Id.* In *Lauritzen,* the Court described this factor as having "cardinal importance," *id.* at 585, and warned that the law of the flag "must prevail unless some heavy counterweight appears." *Id.* at 586. Noting the significance attached by the Court to the law of the flag, the Ninth Circuit has stated that the law of the flag "should be accorded

great weight in the choice of law analysis." *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 689 (9th Cir. 1985). In the instant case, the Vessel was registered in Malaysia; therefore, its flag is Malaysian. This factor points to Malaysian law.

e. Locality: Indeterminable

The locality, or the place of the wrongful act, is "commonly applied to torts in municipal and international law." *Lauritzen*, 345 U.S. at 584. This factor is most relevant to cases involving torts occurring at port because the precise location of the tort can be identified. However, this factor "is of limited application to shipboard torts, because of the variety of legal authority" over which a ship may navigate during its journeys. *Id.* In such cases, the locality factor would impose a different law based solely on where the ship happened to be located at the time of the tort or contract performance. Courts have recognized that imposing on ships the duty of "shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters" is an "onerous" and "unduly speculative burden" that would be "disruptive of international commerce and without basis in the expressed policies of this country." *Romero*, 358 U.S. at 383. This factor is even less helpful in contract suits, because the place of the wrongful act could be either the place of delivery or the allegiance of the plaintiff. *Forsythe*, 633 F. Supp. at 76. In the present case, this factor could point to Busan, South Korea, because the ship was located

there when it needed to be refueled, or to Singapore, the allegiance of Trans-Tec, in which case this factor duplicates the "allegiance of plaintiff" factor. Because the locality is difficult to determine and adds little value to the analysis in a shipboard tort or contracts case, the Court will accord this factor no weight.

f. Inaccessibility of a Foreign Forum: Not applicable

This factor is relevant where the plaintiff would be disadvantaged in terms of delay or expense by the application of foreign law in a United States forum. *Lauritzen,* 345 U.S. at 590. There appears to be no danger of disadvantage in the present case. Both Singaporean and Malaysian law address maritime liens, following English common law. William Tetley, *Maritime Liens and Claims* 1331, 1365 (2d ed. 1998). The parties disagree as to how Singaporean and Malaysian law would govern an unjust enrichment claim, but neither party claims that foreign law could not be applied in the United States. Because neither Trans-Tec nor Defendants claim lack of a foreign forum, this factor does not appear to be a consideration.

g. Law of the Forum: Irrelevant

In *Lauritzen,* the Supreme Court rejected the application of Untied State law simply because "an American forum ha[d] perfected its jurisdiction over the parties and defendant [did] more or less frequent

and regular business within the forum state." *Lauritzen,* 345 U.S. at 590. According [sic] the Court, the very purpose of a conflicts-of-law doctrine is "to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum." *Id.* The Court found this consideration particularly pressing in the context of maritime cases since "jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung. . . ." *Id.* Moreover, the Court noted that the fact that both parties do business in the United States "may fall quite short" of the connection needed to apply United States law to extraterritorial torts. *Id.* Indeed, the Court noted that it was a "denial of due process" for a state to "attempt [ ] to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state." *Id.* at 590-91. In light of the Court's reasoning in Lauritzen, it therefore seems inappropriate to apply United States law simply because the parties filed suit and do business in the United States. Thus, the Court will accord this factor no weight.

h. Shipowner's Base of Operations: Malaysia

Finally, the base of operations factor is relevant where the defendant's place of incorporation and its base of operations are different. Because this factor considers the base of operations of the defendant, in the instant case the Court should look to both the

base of operations of Splendid and the Vessel, since both are named defendants. This factor was created in *Hellenic Lines v. Rhoditis,* where the vessel was owned by a Greek corporation, but the corporation itself was 95% owned by a United States domiciliary and the ship's income was derived entirely from cargo entering and exiting the United States. *Rhoditis,* 398 U.S. at 306; *see also Mattes v. Nat'l Hellenic Am. Line, S.A.,* 427 F. Supp. 619 (S.D.N.Y. 1977) (holding that the ship had "sufficiently substantial contacts" with the United States to warrant the application of United States law because the ship made numerous calls at United States ports, carried primarily American passengers, advertised extensively in the United States, employed a United States corporation to handle marketing and sales operations, and employed a United States corporation as its port and husbanding agent).

In the present case, it is undisputed that Splendid's base of operations is Malaysia.[32] Accordingly, this

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[32] Trans-Tec contends that the base of operations of the Vessel itself is the United States because it transported $48.0 million in goods to and from Long Beach from October 2002 to October 2003. However, Trans-Tec has never provided any foundation or authentication for the documents on which it bases this argument. Moreover, as Defendants point out, even if these documents were admissible, they establish only that a handful of the Vessel's cargo calls were at Long Beach and that none of those stops related to the transaction at issue. *Cf. Banegas v. United Brands Co.,* 663 F. Supp. 198, 205 (D. S.C. 1986) ("The mere fact that the vessel made cargo calls in the

(Continued on following page)

factor weighs in favor of the application of Malaysian law.

i. Conclusion

Applying the *Lauritzen* factors, the Court finds that the application of Malaysian law would be appropriate. While two factors point to Malaysian law and two to Singapore law, one of the factors which points to Malaysian law (the law of the flag) has traditionally been accorded the most weight while the Court has already indicated that one of the factors which points to Singapore law (the place of contract) will be accorded less weight here. While the Court deems the question a close one, especially in light of the fact that Trans-Tec, the injured party, was based in Singapore, the Court finds that, on balance, the factors tip in favor of the application of Malaysian law.

IV. CONCLUSION

Because the Choice of Law Clause did not become part of the bunker contract, and because Splendid, as a non-party, is not bound by the bunker contract, the Court hereby GRANTS the Motion for Partial Summary Judgment by Defendant M/V Harmony Container *in rem* and Claimant Splendid Shipping SDN

United States does not change [the] base of operations . . . to the United States.").

BHD [19] with respect to the question of whether the Choice of Law Clause determines the choice of law and hereby DENIES Trans-Tec's Cross-Motion for Partial Summary Judgment on Choice of Law [32] with respect to the question of whether the Choice of Law Clause determines the choice of law. Moreover, because the *Lauritzen* factors favor of the application of Malaysian law, the Court GRANTS the Motion for Partial Summary Judgment by Defendant M/V Harmony Container *in rem* and Claimant Splendid Shipping SDN BHD [19] with respect to the question of which country's law applies. Accordingly, the parties are ORDERED to file simultaneous motions for summary judgment based on the application of Malaysian law to this dispute *by no later than Monday, September 19, 2005.* Replies will be due one week later on *Monday, September 26, 2005.* A hearing will then be held at 1:30 p.m. on *Monday October 3, 2005.*

IT IS SO ORDERED.

DATED: 8/16/05 /s/ [Illegible]
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRANS-TEC ASIA, Plaintiff, v. M/V HARMONY CONTAINER Its freights, engines, apparel, and tackle, Defendant *in rem* Splendid Shipping Sendirian Berhard, Defendant, and The Master of the M/V HARMONY CONTAINER, Garnishee.	CV 04-1160 SVW (MANx) ORDER DENYING PLAINTIFF TRANS-TEC ASIA'S RULE 56(f) MOTION (Filed Dec. 28, 2004)

TO THE PARTIES AND THEIR COUNSEL OF RECORD:

I. INTRODUCTION

In this admiralty case, filed in this Court on February 20, 2004, Plaintiff Trans-Tec Asia ("Trans-Tec") asserts five causes of action against Defendant *in rem* M/V Harmony Container ("Vessel"), which is registered under the laws of Malaysia, and Defendant Splendid Shipping Sendirian Berhard ("Splendid"), a Malaysia corporation and the owner of the Vessel

(collectively "Defendants"). The five causes of action are: (1) maritime lien claims in contract against the Vessel and freights; (2) maritime lien claims in tort against the Vessel and freights; (3) maritime claims in contract, against the owner; (4) unjust enrichment claims against the owner; and (5) maritime attachment and garnishment of the Vessel and bunkers of the Vessel.

On October 21, 2004, Defendants filed their Motion for Partial Summary Judgment by Defendant M/V Harmony Container *in rem* and Claimant Splendid Shipping SDN BHD ("MSJ"). On November 1, 2004, the Court signed the parties' Stipulation to Continue Hearing on Defendants' Motion for Partial Summary Judgment and for Briefing Schedule ("Stipulation"). The Stipulation gave Trans-Tec additional time to serve its Opposition to Defendants' MSJ. On November 24, 2004, Trans-Tec Asia filed its Response Opposing Splendid's Partial Summary Judgment Motion on Choice of Law and Supporting Trans-Tec's Partial Summary Judgment Motion on Choice of Law ("Response"). In conjunction with its Response, Trans-Tec filed its Statement of Genuine Issues Opposing Splendid's Partial Summary Judgment Motion on Choice of Law ("Statement of Genuine Issues"). As part of its Statement of Genuine Issues, Trans-Tec filed an affidavit in which it requested that the Court extend time for discovery. The Court construes this affidavit as a Rule 56(f) motion to extend time for discovery.

II. FACTUAL BACKGROUND[1]

In June 2000 Splendid chartered the Vessel to Kien Hung Shipping Co. Ltd. ("Kien Hung"), a Taiwanese cargo shipping line. Under the charter, Kien Hung operated the Vessel in a loop from North America and South America to Japan, China and Korea, and then back to North America. The North American ports were Long Beach, California and Manzanillo, Mexico. Trans-Tec has provided shipping records showing that the Vessel transported $48.9 million in goods to and from Long Beach from October 2002 to March 2003.

In February 2003 Kien Hung contacted Trans-Tec in Singapore to order bunkers (ship fuel) for the Vessel at a price of $251,850. On February 17, 2003, Trans-Tec sent an e-mail from its Singapore office confirming the sale. A physical supplier delivered the bunkers to the Vessel at Busan, South Korea on February 24, 2003. On February 28, 2003, Trans-Tec sent an invoice to the Vessel, her owners/operators, and Kien Hung on Singapore office letterhead requiring payment by April 10, 2003. Because Trans-Tec is a wholly-owned subsidiary of World Fuel Services Corporation ("WFS"), a group of companies headquartered in Miami, Florida, the invoice requested payment to a Chicago bank account. However, the invoice

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[1] This summary of the facts is taken from the factual summary provided in the Court's Order dated July 28, 2004 and does not reflect any evidence or factual contentions contained in the parties' most recent briefs and motions.

directed all billing inquiries to Trans-Tec's Singapore office.

Kien Hung encountered financial difficulties and sold off its holdings, including selling its operations to Hamburg Sud, which took over the charter of the Vessel. Kien Hung was out of business by May 2003. As a result, Kien Hung never paid Trans-Tec for the bunkers.

Hamburg Sud continued sailing the Vessel to Long Beach with an expected call date of May 26, 2003. Trans-Tec threatened to arrest the Vessel at Long Beach. As a result, the Vessel's insurers posted $300,000 security for the Vessel.

III. DISCUSSION

Johannes Heijmen ("Heijem [sic]") is the Vice President for Credit & Risk Management of WFS at its Miami, Florida headquarters. (Heijmen Decl. ¶ 2.) Trans-Tec Asia is the trading name of World Fuel Services (Singapore) Pte. Ltd., a wholly-owned subsidiary of WFS. (Heijmen Decl. ¶ 2.) In his capacity as the Vice President for Credit & Risk Management, Heijmen is personally familiar with WFS' sales in 2002 and 2003 around the world to Kien Hung for the various vessels that Kien Hung owned or operated,

including the M/V Harmony Container. (Heijem Decl. ¶ 2.)[2]

Heijmen claims that many of the factual contentions in Splendid's Statement of Uncontroverted Facts are outside the knowledge of Trans-Tec and that, without further discovery, Trans-Tec can neither confirm nor deny them. (Heijmen Decl. ¶ 3.)

Under Rule 56(f) of the Federal Rules of Civil Procedure, a district court may continue a motion for summary judgment to permit additional time for discovery. Fed. R. Civ. P. 56(f); *Natural Resources Defense Council v. Houston,* 146 F.3d 1118, 1132 (9th Cir. 1998).[3] The party seeking the additional time must show "(1) that [it] [has] set forth in affidavit form the specific facts [it] hope[s] to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *State of Cal. ex. rel.*

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[2] The factual contentions contained in the preceding paragraph are Heijmen's. The Court reiterates them simply to provide context for Trans-Tec's request for more time.

[3] Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

Cal. Dep't of Toxic Substances Control v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). It is particularly important that the party seeking additional time identify the *specific* facts which, if discovered, would preclude summary judgment. *See, e.g., Maljack Productions, Inc. v. Goodtimes Home Video Corp.,* 81 F.3d 881, 888 (9th Cir. 1996) ("Rule 56(f) requires the nonmoving party to show that additional discovery would uncover specific facts which would preclude summary judgment."); *Mackey v. Pioneer Nat'l Bank,* 867 F.2d 520, 524 (9th Cir. 1989) ("A Rule 56(f) motion must show how additional discovery would preclude summary judgment and why a party cannot immediately provide 'specific facts' demonstrating a genuine issue of material fact."); *United States v. $5,644,540.00 in U.S. Currency,* 799 F.2d 1357, 1363 (9th Cir. 1986) ("'[The party making the Rule 56(f) motion] may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts'" (quoting *Sec. & Exch. Comm'n v. Spence & Green Chem. Co.,* 612 F.2d 896, 901 (5th Cir. 1980))); *Hancock v. Montgomery Ward Long Term Disability Trust,* 787 F.2d 1302, 1306 n.1 (9th Cir. 1986) ("An opposing party has the burden under Rule 56(f) to show what facts she hopes to discover to raise an issue of material fact."). Moreover, "[a] movant cannot complain if it fails to diligently pursue discovery before summary judgment." *Mackey,* 867 F.2d at 24. Thus, "[t]he failure to conduct discovery diligently is grounds for the denial of a Rule 56(f) motion." *Pfingston v. Ronan Eng'g Co.,* 284 F.3d 999, 1005 (9th Cir. 2002). However, "denial of a Rule 56(f)

application is generally disfavored where the party opposing summary judgment makes (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists." *Visa Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986).

Heijmen claims that Trans-Tec is unable to confirm or deny twenty-two (22) of the factual contentions set forth in Splendid's Statement of Uncontroverted Facts and Conclusions of Law. The 22 factual contentions cited by Heijmen fall into five subject areas:

(1) Theories on existence of Joint Venture between Kien Hung & Halim Mazmin – Splendid Facts 4, 6, 7, 8 and 14

(2) Ownership of the Vessel – Splendid Fact 5

(3) Place of business & ownership of corporations – Splendid Facts 9, 10, and 11

(4) Parties to & terms of Charter Party – Splendid Facts 16 and 17

(5) Splendid's involvement in & knowledge of bunker contract – Splendid Facts 21, 23, and 24

In order to understand the significance of the factual contentions cited by Heijmen, some review of the choice of law issue will be helpful. Trans-Tec argues that the bunkering contract contained a choice

of law clause that binds Splendid. In order to show that there is a choice of law clause that binds Splendid, Trans-Tec must show that (1) the bunkering contract contained a choice of law clause, and (2) Splendid was bound by the contract. If Trans-Tec cannot show that there is choice of law clause that binds Splendid, then the choice of law will be determined by general maritime law. *See Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997) (holding that "federal courts sitting in admiralty apply federal maritime choice-of-law principles derived from the Supreme court's decision in *Lauritzen* . . . and its progeny").

In *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953), the Supreme Court identified seven factors to be considered in determining the choice of law: (a) the allegiance of the plaintiff, (b) the allegiance of the defendant shipowner, (c) the place of the contract, (d) the law of the flag, (e) the locality, (f) the inaccessibility of a foreign forum, and (g) the law of the forum.[4] The Supreme Court has since clarified that this list of factors is not exhaustive, and there may be other factors to be considered. *See Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970). At that time, the Court added an eighth factor to the *Lauritzen* analysis: (h) the shipowner's base of operations. *Id.* The

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[4] *Lauritzen* involved a maritime tort suit under the Jones Act, but the Supreme Court subsequently held that the *Lauritzen* factors apply to maritime actions generally. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959).

Ninth Circuit has interpreted the *Rhoditis* expansion of the *Lauritzen* analysis to mean that courts must look at all points of contacts between the transaction and sovereign legal systems affected by it, rather than applying the seven factors mechanically. *See Gulf Trading & Transp. Co. v. M/V TENTO* ("*Tento*"), 694 F.2d 1191, 1195 (9th Cir. 1982).

In attempting to establish that the bunkering contract contained a choice of law clause that binds Splendid, Trans-Tec must overcome the fact that, although Splendid is now and was then the owner of the Vessel, Splendid was not a party to the bunkering contract. Trans-Tec tries to accomplish this by arguing that Splendid was a joint venture between two companies and that one of these companies was a shell corporation for the company which actually entered into the bunkering contract. It is by this circuitous route that Trans-Tec seeks to bind Splendid to a contract to which it was not a party.

The elements of a joint venture are: (1) a specific agreement to carry on an enterprise for profit; (2) an intent to be joint venturers; (3) mutual contributions of financing, skill, property, knowledge, or effort; (4) some degree of joint control over the venture; and (5) a provision for the sharing of both profits and losses. *Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990).[5]

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[5] Even if Trans-Tec can satisfy these elements, Splendid is a corporation and "[a] corporation and a joint venture are

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In order to establish that one company was the alter ego or instrumentality of another, a plaintiff must establish that the allegedly controlling corporation either used its alter ego to perpetrate a fraud or so dominated and disregarded its alter ego's corporate form that the alter ego was actually carrying on the controlling corporation's business instead of its own. *Chan,* 123 F.3d at 1294.

At the time of the bunkering contract, Halim Mazmin, a Malaysian corporation, owned 60% of Splendid and Powick Marine ("Powick"), a Singapore corporation, owned 40%.[6] Trans-Tec asserts that Powick was merely a shell corporation for Kien Hung and that, as a result, Splendid was a joint venture between Halim Mazmin and Kien Hung. In support of its joint venture theory, Trans-Tec cites news articles and press releases in which the chief executive of Halim Mazmin referred to its partnership with Kien Hung. Given this relationship, Trans-Tec contends that Kien Hung, in entering into the bunker agreement, acted not only as the Vessel's charterer, but also as an owner on behalf of Splendid. In response,

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mutually exclusive ways of doing business." *Id.* at 702. Thus, Trans-Tec must persuade the Court to disregard the corporate form of Splendid in order to prevail on its joint venture theory. Furthermore, even if Trans-Tec were to show that Halim Mazmin and Kien Hung were joint venturers, it would have to show that the bunkering contract was within the scope of the joint venture.

[6] After Kien Hung encountered financial problems, Halim Mazmin acquired 100% of Splendid.

Defendants argue that Splendid is and always has been a corporation, not a joint venture, and that in any event Kien Hung was never a Splendid shareholder.

Alternatively, Trans-Tec argues that Splendid is bound by the bunker agreement because the bunker transaction confirmation and Trans-Tec's terms and conditions provided that the bunker sale was on the credit of the Vessel owners. Defendants counter that Trans-Tec, which drafted the confirmation and the terms and conditions, cannot unilaterally bind a non-party to the contract.

1. Existence of Joint Venture between Kien Hung & Halim Mazmin

Trans-Tec intends to prove the existence of joint venture between Kien Hung and Halim Mazmin. However, it claims that it lacks sufficient information at present to confirm or deny the following factual contentions:

- ***Splendid Fact 4:*** At all relevant times to this litigation, 60% of [Splendid's] stock was owned by Halim Mazmin Berhad, a Malaysian public corporation ("Halim Mazmin") and the remaining 40% was owned by Powick Marine (Singapore) PTE Ltd. ("Powick"), a Singapore corporation, with its principal place of business in Singapore.

- ***Splendid Fact 6:*** Splendid is not and has never been registered as a joint venture in Malaysia. Further, there is no joint venture agreement between Halim Mazmin and Kien Hung.

- ***Splendid Fact 7:*** At all relevant times, Halim Mazmin and Powick were the only shareholders in Splendid (owning 60% and 40% respectively); Kien Hung was not and never has been a shareholder in Splendid.

- ***Splendid Fact 8:*** At all relevant times, Splendid had a board of 5 directors operating by simple majority vote: 3 directors were appointed by Halim Mazmin, including the Managing Director who as [sic] vested with overall control and management of the business and operation of the Company; and 2 directors were appointed by Powick.

- ***Splendid Fact 14:*** Kien Hung has 334 registered shareholders. Five of those shareholders are Shih family members . . . who hold 63.4% of the stock, and the balance of 36.6% of is [sic] held by the remaining 329 shareholders. From June 2002 to the present, Kien Hung's directors were Shih Wen Kuo, Shih Shia Loon, and Chen Yi.

Trans-Tec claims that it cannot confirm or deny these factual contentions without additional discovery.[7] In addition, it claims that it needs further discovery in order to show that Powick was used by Kien Hung as a shell corporation and that Splendid was a joint venture between Halim Mazmin and Kien Hung.

In response, Splendid argues that Trans-Tec (1) has not set forth what specific facts it hopes to uncover that will allow it to confirm or deny these factual contentions and prove its own claims, (2) has not explained why it cannot confirm or deny what are matters of public record, (3) has not explained why it did not previously seek the discovery it now seeks, and (4) has not provided legal authority for the proposition that the existence of "common directors" suffices to prove the existence of a joint venture.[8]

2. Registered Owner of the Vessel

"Under international law, each state determines the conditions on which it grants its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it." *Lauritzen*, 345 U.S.

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[7] Nonetheless, Heijmen says that Splendid Fact 14 "shows the dominance of Powick's shareholders in Kien Hung, and vice versa." (Heijmen Decl. ¶ 5.)

[8] Defendants have cited legal authority for the proposition that the existence of "common directors" is insufficient to prove a joint venture.

at 584. This principle is embodied in the law of the flag factor, in which the ship's nationality, determined by its registration papers and flag, indicates what law should be applied. *Id.* The Ninth Circuit has recognized that the law of the flag is of "cardinal importance" and "should be accorded great weight in the choice of law analysis." *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 689 (9th Cir. 1985). This factor "must prevail unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 586. In the instant case, the Vessel was registered in Malaysia; therefore, its flag is Malaysian. This factor points to Malaysian law.

Because it seeks to apply American law, Trans-Tec seeks to challenge Splendid's claim that it was at all relevant times the owner of the Vessel. Thus, it claims that it lack [sic] sufficient information to confirm or deny the following fact:

- ***Splendid Fact No. 5:*** Splendid was at all relevant times the registered owner of the Vessel.

Trans-Tec does not explain why it is presently unable to either confirm or deny this factual assertion; instead, it argues that the registered ownership of the Vessel is immaterial and that the only issue is who in fact controlled Splendid. Trans-Tec claims that further discovery will is [sic] needed to prove that Splendid was a joint venture operated by Halim Mazmin and Kien Hung.

In response, Splendid notes that (1) the registered ownership of the Vessel is material under the *Lauritzen* factors, (2) Trans-Tec has not identified any legal authority for the proposition that control of Splendid by another company or companies would alter the choice-of-law analysis under *Lauritzen,* and (3) Trans-Tec has not identified what evidence it seeks that, if obtained, would disprove Splendid's ownership of the Vessel.

3. Place of Business & Ownership of Corporations

Trans-Tec hopes to prove that Powick was a shell corporation for Kien Hung. Thus, it claims that it cannot confirm or deny the following factual contentions relating to the place of business and ownership of Powick:

- ***Splendid Fact 9:*** Powick is a Singapore corporation; it has been in existence since 1994 and had paid up share capital of Singapore $49,817,842.
- ***Splendid Fact 10:*** Upon its incorporation and at all relevant times, Powick's shareholders were: Shin Wen Kuo, Shih Shia Loon, Shih Shia Shung, Shih Shia Hsiang, and Shih Ming Tuan; and its directors were: Shih Wen Kuo, Shih Ming Tuan, Shih Shia Loon, Tan Chak Chew, and Ng Ee Choo Linda.
- ***Splending Fact 11:*** Kien Hung never owned any stock in Powick.

Trans-Tec acknowledges that these alleged facts may be matters of public record, but it claims that the fact that Powick is a Singapore corporation is irrelevant if in fact Powick was operated as a shell corporation by Kien Hung. Further, it argues that the shareholder list shows that Kien Hung's directors were a part of Powick. However, Trans-Tec acknowledges that, without more discovery, it cannot prove that Kien Hung's directors used their status as Powick shareholders to control Splendid.

In response, Splendid argues that (1) Trans-Tec has not set forth what specific facts it hopes to uncover that will prove its claim that Powick exercised control over Splendid on behalf of Kien Hung, (2) these factual allegations can be confirmed or denied by reference to readily available public documents, (3) WFS, the owner of Trans-Tec, filed suit against Powick in June 2003 and could have obtained such information during the course of that suit, and (4) Trans-Tec was involved in public proceedings against Kien Hung in Hong King [sic] and could have obtained such information during the course of those proceedings.

4. Terms of & Parties to the Charter

Trans-Tec claims that it lacks sufficient information to confirm or deny the following factual allegations:

- ***Splendid Fact 16:*** Splendid entered into a New York Produce Exchange charter party contract in June 2000 with Kien Hung for a 10 year time charter of the Vessel (the "Charter Party").

- ***Splendid Fact 17:*** The Charter Party required and Kien Hung agreed to: provide and pay for all bunkers purchased for the Vessel and not allow or cause any "lien or encumbrance" to be incurred by it or its agents against the Vessel.

In response, Splendid argues that (1) the parties and terms of the Charter Party are not subject to dispute and do not warrant discovery and (2) Trans-Tec has not explained what evidence it needs in order to be able to confirm or deny these asserted facts or how such evidence will change the outcome of the Court's ruling on the MSJ.

5. Splendid's Involvement in and Knowledge of the Bunkering Contract

As an alternative to the joint venture theory, Trans-Tec hopes to prove that Splendid was involved in and had knowledge of the Bunkering Contract. Thus, Trans-Tec claims that it lacks sufficient information to confirm or deny the following factual allegations:

- ***Splendid Fact 21:*** Plaintiff did not negotiate the bunker supply transaction of February 17, 2003 with Splendid or the Master of the Vessel.

- ***Splendid Fact 23:*** Splendid had no knowledge that Kien Hung allegedly agreed Plaintiff's "terms and conditions" of January 3, 2000, including any alleged U.S. or Florida choice of law clause contained therein, would govern the Bunker Confirmation.

- ***Splendid Fact 24:*** Splendid had no knowledge of Plaintiff's "terms and conditions" of January 3, 2000, including any alleged U.S. or Florida choice of law clause, or that they would govern the Bunker Confirmation.

Trans-Tec claims that it can neither confirm nor deny these asserted facts because Splendid's knowledge and involvement are solely within Splendid's control and information pertaining to Splendid's knowledge and involvement can only be elicited through additional discovery.

In response, Splendid argues that Trans-Tec has not set forth what specific facts it hopes to uncover that will prove its claim that Splendid had knowledge of and was involved in the Bunkering Contract and has not explained why it has not previously sought the discovery it now seeks.

Splendid's responses to Trans-Tec's proffered reasons for needing more time are well taken. Trans-Tec has not identified the specific facts it seeks to uncover that will provide admissible evidence of its allegations. Nor has it identified what documents it needs or what individuals it seeks to depose in order

to discover these facts. Instead, Trans-Tec merely reiterates the allegations contained [sic] its Complaint and speculates that further discovery may confirm the allegations. However, aside from the press clippings it references, it provides no evidence that further discovery will in fact confirm these allegations. Moreover, several of the factual contentions which Trans-Tec claims to lack sufficient evidence to confirm or deny (e.g., the Vessel's Malaysian registration, the fact that Powick is a Singapore corporation) are matters of public record which Trans-Tec could have easily confirmed or denied through informal discovery.[9] Furthermore, Trans-Tec does not explain how the conduct it alleges, if proven, would suffice to preclude summary judgment for Splendid. As explained above, Trans-Tec must prove more than the mere existence of a joint venture; it must also prove that the bunkering agreement was within the scope of the joint venture.[10] Nothing alleged by Trans-Tec would, if proven, establish that the bunkering contract was within the scope of the joint venture.

In addition, Trans-Tec has apparently conducted *no formal discovery of any kind* since filing suit in February 2004. Trans-Tec's conduct is particularly egregious as it was put on notice *twice* that it would

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[9] Trans-Tec's Opening Brief on Dispositive Legal and Equitable Principles, filed May 10, 2004, shows that Trans-Tec is capable of conducting such informal discovery.

[10] Further, it must persuade the Court to disregard the corporate form of Splendid and Powick.

need to brief the choice-of-law issue. At the April 19, 2004 new case status conference, Trans-Tec indicated that one of its causes of action was for unjust enrichment. At that time, counsel for Defendants told the Court that the unjust enrichment claim would be impacted by the choice of law; as a result, the Court instructed the parties to brief the choice of law issue as well. Subsequently, in its July 28, 2004 Order, the Court explicitly directed the parties to brief the choice of law issue.[11] The July 28 Order concluded by noting

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[11] The Court spelled out in detail the legal framework which governed the choice of law issue. In its Conclusion to the choice of law section of the Order, the Court provided the following guidance to the parties:

> The issues that should be addressed in the briefs on choice of law include the following. The threshold question is whether there is a binding contractual choice of law clause. To support its content [sic] that such a clause is present, Plaintiff will first have to show that contract included a choice of law clause. This questions requires a contract formation analysis; Defendants allege that Plaintiff first referred to its terms and conditions, which provide for United States law, in its e-email [sic] confirmation of the bunker agreement, while Plaintiff argues that Kien Hung was well aware of those terms and conditions. Plaintiff will have to show that there was a joint venture and that entering into a bunker agreement was within the purpose of the joint venture.
>
> Should the Court conclude that the choice of law was not determined by contract, then it will turn to general maritime choice of law principles. Based on the facts before the Court at this time, the relevant factors point to Singapore and Malaysia. Plaintiff argues that the base of operations factor points to the United

(Continued on following page)

that the Court "will await the motion(s) for partial summary judgment on choice of law. . . ." Trans-Tec Asia v. M/V Harmony Container, No. 04-1160, slip. op. at 22 (C.D. Cal. July 28, 2004). Given the April 19 status conference and the July 28 Order, Trans-Tec has had actual notice for at least five months and up to eight months that it would have to respond to a summary judgment motion regarding the choice-of-law issue.[12] Moreover, it had detailed notice of the issues involved.

III. CONCLUSION

Because Trans-Tec has conducted no formal discovery of any kind since filing suit and has not identified the specific facts it seeks to discover or adequately explained how these facts, if discovered, would preclude summary judgment, the Court hereby DENIES Trans-Tec's Rule 56(f) motion to extend time for discovery.

> States, but Plaintiff has not provided sufficient additional evidence to swing this factor to the United States. Regardless, Singapore and Malaysia would each have two factors. The ultimate determination as to choice of law will depend upon what weight each factor is given, which will in turn depend upon the specific facts in the case. The parties should address that question.

Trans-Tec Asia v. M/V Harmony Container, No. 04-1160, slip. op. at 16-17 (C.D. Cal. July 28, 2004).

[12] In addition, the Stipulation gave Trans-Tec additional time to respond to Defendants' MSJ.

IT SO ORDERED.

DATED: DEC 28 2004 /s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANS-TEC ASIA, Plaintiff-Appellant, v. M/V HARMONY CONTAINER, its freights engines apparel and tackle; SPLENDID SHIPPING SENDIRIAN BERHAD; MASTER OF THE M/V HARMONY CONTAINER, Defendants-Appellees.	No. 06-55355 D.C. No. CV-04-01160-SVW Central District of California, Los Angeles ORDER (Filed May 5, 2008)

Before: KOZINSKI, Chief Judge, TASHIMA and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Chief Judge Kozinski and Judge McKeown vote to deny the petition for rehearing en banc and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

46 USCS § 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

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46 USCS § 31341. Persons presumed to have authority to procure necessaries

(a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by –

(A) the owner;

(B) a charterer;

(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

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46 USCS § 31301. Definitions

* * *

(4) "necessaries" includes repairs, supplies, towage, and the use of a dry dock or marine railway;

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